Supreme Court, U.S.
FILED

09-1402 MAY 13 2010

OFFICE OF THE CLERK

No. 09A828

In The
Supreme Court of the United States

CATHERINE JANE VON KENNEL GAUDIN

Petitioner,

v.

JOHN R. REMIS, JR.

Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Paul A. Lynch
Counsel of Record
Paul A. Lynch LLC
P.O. Box 1911
Waianae, Hawaii 96792
(808) 696-4646

Attorney for Petitioner

QUESTIONS PRESENTED

The Hague Convention on International Child Abduction requires a county to return a child who has been wrongfully retained "expeditiously in proceedings for the return of children," art. 11. If proceedings are commenced where the child is on a date less than one year from the date of the wrongful retention, "the authority concerned shall order the return of the child forthwith." art. 12.

1. Whether the appellate court in a Hague Convention/ICARA case may unilaterally change the Petition of the Petitioner by changing the date as of which all Hague requirements of the Petitioner and all defenses of the Respondent are to be determined, changing the posture of the case, its status, and/or its result.

2. Whether under the Hague Convention, where the child(ren) have attained the age of sixteen (16) years any and all relief to the Petitioner is precluded as a matter of law.

3. Whether under the Hague Convention on International Child Abduction, the equitable principle that a legally determined 'wrongdoer' may not benefit from the wrongdoing applies, in furtherance of the purpose and goal of the Convention in the context of the relationship determined by the Hague Convention Court.

LIST OF PARTIES

Petitioner: Catherine Jane Von Kennel Gaudin

Respondent: John R. Remis, Jr.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

LIST OF PARTIES.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....iv

PETITION FOR WRIT OF CERTIORARI.....1

OPINIONS BELOW..... 1

JURISDICTION.....1

STATUTORY PROVISIONS.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT.....14

I. In This Case of First Impression Certiorari Should Be Granted to Determine And/or Clarify The Authority Of A Court, If Any, To Unilaterally Change The Petition In An Action Filed Pursuant to The Hague Convention And ICARA, So That People Will Not Be Discouraged From Using Applications Under The Hague To Vindicate Their And Their Children's Rights.....14

II. The Court Should Grant The Writ Of Certiorari To Make Clear That The Hague Convention/ICARA 'Wrongdoer' Will Not Be Allowed To Receive Any Benefit From His Wrongdoing

Including Using Any Advantage Or Defense That Might Otherwise Be Available But For The Wrongdoing.....20

III. The Court Should Grant The Writ Of Certiorari To Inform The Courts, The Bar, And The Public That "Grave Risk" Is Very Serious, Narrowly Construed And That Attempts to Ignore The Law's Requirements Will Not Be Countenanced And Will Have Negative Consequences.....22

IV. The Court Should Grant The Writ of Certiorari To Establish and Clarify That Relief Under The Hague Convention And ICARA Includes The Court's Authority To Fashion Relief To Avoid Results That Are In Derogation Of The Purpose And Existence Of The Hague Convention Or Contrary To Its Letter And Spirit.....25

CONCLUSION.....39
APPENDIX

TABLE OF AUTHORITIES

Constitutional Provision

U.S. Constitution - Amendment 1.....7

Cases

Asakura v. City of Seattle,
265 U.S. 332, 341 (1924).....27

A v. Central Authority for New Zealand,
[1996] 2 N.Z.F.L.R. 517 (N. Z. 1996).....18

Belay v. Getachew,
272F.Supp2d 553 (D.Mdl 2003), ...21,25

Blondin v. Dubois ,
189 F.3d 240,249 (2d Cir.1999)
(Blondin I) 16

Blondin v. Dubois,
238 F.3d 153,163 n.11 (2d Cir.2001)
(Blondin II) 18

Church of Scientology of California v. United States,
506 U.S. 9(1992).....26

Cuellar v. Joyce,
No. 09-35068 (9th Cir, 2-19-2010) 22, 23, 34

Danaipour v.McLarey,
286 F.3d 1 (1st Cir.2002).....16.18

De Geofroy v. Riggs,
133 U.S. 258, 271 (1890).....27

*Distribuidora Dimsa v. Linea Aerea Del Cobre S.A.,
976 F.2d 90 (2nd Cir. 1992).....27

England v. England,
234 F.3d 268, 271 (5th Cir. 2002)).....31

Friedrich v. Friedrich,
78F.3d (CCA 6 1996) 18,23

Gaudin v. Remis,
282 F.3d 1178 (9th Cir. 2002)
(Gaudin I).....1,passim

Gaudin v. Remis,
379 F.3d 931 (9th Cir. 2004)
(Gaudin II).....1,passim

Gaudin v. Remis,
415 F.3d 1028 (9th Cir. 2005)
(Gaudin III).....1,passim

Gaudin v. Remis,
334 F.App.133 (9th Cir. 2009)
(Gaudin IV) 1,passim

Hauenstein v. Lynham,
100 U. S. 483, 487 (1879)..... 27

Holder v. Holder,
305 F.3d 854, 860 (9th Cir.2002).....31

In re Vernor,,
94 S.W.3d 201, 207 (Tex. App. 2002)..... 31

Mozes v. Mozes,
239 F.3d 1070(9th Cir.2001).....5,18,22,23,24,29,31

Pub. Utilities Comm'n of the State of Cal. v.
F.E.R.C.,
100 F.3d 1451, 1460 (9thCir.19.....30

Sale v. Haitian Center Council's Inc., 509 U.S. 155,
194 (1993) 29

Sanchez-Llamas v. Oregon,
548 U.S. 331, 347 (2006) 32

Silverman v. Silverman,
338F.3d. 800.896 (8th Cir.2003) 22

Smith v. Maryland,
10 U.S. 286, 294 (1810).....27

Sonderup v. Tondelli,
2001 (1) sa 1171 (CC) 18

Tucker v. Alexandroff,
183 U. S. 424, 437 (1902).....27

*Walsh v. Walsh,
221 F.3d 204 (1st Cir. 2000).....16,18

Statutes

*28 U.S.C. § 1254 (1).....2

28 U.S.C. §§ 11601 et seq. – International Child Abduction Remedies,
USCS (4-20-1988)(App.K)..... 2,passim

42 U.S.C. § 11601 .....4,passim
42 U.S.C. § 11603(h).....27

R.S.Q., chapter A-23.01 AN ACT RESPECTING THE CIVIL ASPECTS OF INTERNATIONAL AND INTERPROVINCIAL CHILD ABDUCTION
(the Quebec legislation implementing the Hague Convention).....10

Fed. R. Civ. Proc. Rule 54(d)(2)..... 2,14,34,36,37,38
Fed. R. Civ. Proc. Rule 56.....16
Fed. R. Civ. Proc. Rule 60(b) (App. D).....3, passim

Haw. Local R.54.3(a).....37

Public Notice 957, 51 No. 58 Fed. Reg. 10494,..... 26

International Treaty

Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670 (App. J)

In General.....2,.passim

Article 3.....3,passim
Article 4.....26
Article 5.....36
Article 12.....4,21,25,26
Article 13(b).....4,passim

Article 16.....28,33,34,37
Article 17.....29
Article 26.....35
Article 35.....26

Other Authorities

On Private International Law: Overall Conclusions Of The Special Commission Of October 1989 On The Operation Of The Hague Convention Of 25 October 1980 On The Civil Aspects Of International Child Abduction, 29 I.L.M. 219, 223 (March 1990).....26

Elisa Pérez-Vera, Explanatory Report
Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 449 (1982) ("Explanatory Report"), available online at http://www.hcch.net/upload/expl28.pdf
.....6,26,30,35,36

10-54 Moore's Federal Practice - Civil § 54.171
Matthew Bender, (Third ed.).....37

PETITION FOR WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Catherine Jane Von Kennel Gaudin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Order of the Court of Appeals dated December 14, 2009, denying the Petition for Rehearing En Banc (Appendix at App.I-1). The Memorandum decision of the Court of Appeals dated October 19, 2009 (Appendix at App. H-1). The District Court's Findings of Fact and Conclusions of Law and Order Dismissing Petition filed June 1, 2007 (Appendix at App.. G-1). Order Denying Pending Motions by District Court filed May 9, 2007 (Appendix at App. F-1). The opinion of the United States Court of Appeals for the Ninth Circuit July 18, 2005, Gaudin v. Remis 415 F.3d 1028 (9th Cir. 2005). Gaudin v. Remis 379 F.3d 631 (9th Cir. 2004). Gaudin v. Remis 282 F3d 1178 (9th Cir. 2002). The District Court's Order dated December 26, 2001 Denying Motion to Entertain Motion to Vacate Order, and Denying Motion to Vacate Order for Lack of Jurisdiction (Appendix at App.E-1). The District Court's Order dated December 11, 2000 (unreported), - denying the Petition for return of children to Petitioner pursuant to 42 USC 11601 et seq. (Appendix at App.C-1.)

JURISDICTION

The Court of Appeals filed its Memorandum Disposition and Judgment on October 19, 2009. The Court of Appeals entered its Order on December 14, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). An extension of time to file petition was granted on March 12, 2010 to and including April 12, 2010, to and including May 4, 2010. An application for extension to May 13, 2010 is pending.

STATUTORY PROVISIONS

I. 28 U.S.C. §§ 11601 et seq. — International Child Abduction Remedies, USCS (4-20-1988).(App. K)

II. Hague Convention on the Civil Aspects of International child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670 (App. J)

III. Federal Rules of Civil Procedure 54(d)

In part: "(2) Attorney's Fees.

(A) Claims for attorney's fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of an appealable order or judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must

state the amount or provide a fair estimate of the amount sought..."

IV. Federal Rules of Civil Procedures 60 (b)

In part: Relief from Judgment or Order

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; ..."

STATEMENT OF THE CASE

This case presents a case of first impression as to the right of an Appellate Court presiding over a case pursuant to and under the provisions of the Hague Convention on International Child Abduction to unilaterally change a Petition filed by a person whose children were wrongfully retained in a country other than their habitual place of residence, thereby affecting the resolution of the appeal, the mandate, and the subsequent outcome.

1. The Hague Convention on International Child Abduction (App. J) is the primary source of international law governing the prompt return of children who have been wrongfully abducted or

retained by a parent in another country. That is the primary purpose, goal, and operation of the Convention. It operates on a required set of facts that include the following: at the date of the alleged wrongful acts prior to the filing of a Petition for the return of children under the Hague Convention, the children's habitual place of residence must have been in a country other than the one in which they are wrongfully retained, and the wrongful conduct must have breached rights of custody in the other parent under the law of the State in which the child was habitually resident immediately before the removal or retention. Hague Convention, article 12:

> "Where a child has been wrongfully removed or retained in terms of Article 3, and at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith...."

All of the prerequisites to Petitioner's being completely and immediately entitled to an order or the return of Petitioner's wrongfully retained children, were fulfilled in this case by the time of the initial hearing on December 8, 2000, pursuant to her petition filed on November 22, 2000.

The Hague Convention has a very narrow defense that was claimed by Respondent: that

"... there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."
Article 13 (b), Hague Convention. (App. J)

On December 11, 2000, the U.S. District Court for the District of Hawaii issued an Order Denying Petition for Return of Children to Petitioner Pursuant to 42 U.S.C. § 11601 et seq. In this Decision the Court erroneously deferred to the state Family Court, Gaudin III, 415 F.3d 1028 (9th Cir. 2005)at 1035-1036 (9th Cir. 2005) and invited the state Family Court, which was starting a custody trial between the two parties to the federal Hague case before him on the next day, December 12, 2000, to confirm whether there was grave risk of psychological harm demonstrated by clear and convincing evidence. (App.C-5)

This decision was reversed by Gaudin III, finding that the U.S. District Court had erred in deferring his responsibilities to the state court. The appellate court declined to review whether there was a grave risk of psychological harm, acknowledging Petitioner's dispute of that conclusion, but agreed with Petitioner's position that even if there was grave risk of psychological harm, the District Court erred in failing to consider alternative remedies by means of which the children could be transferred back to Canada without risking the requisite harm. Gaudin III, However, before instructing the lower court to do so upon remand, it gave the theory and authority and rationale for doing as much as possible to see to the return to Quebec of the children, citing

Mozes v. Mozes, 239 Fed.3d 1067 (9th Cir. 2001) and the Pérez-Vera Explanatory Report, (App. L, para. 13, 16). It then stated,

> "The district court, obviously, must consider the effect of any possible remedies in light of circumstances as they exist in the present, not as they were five years ago. It is therefore unnecessary for us to evaluate the merits of the district court's finding that a grave risk of psychological harm existed in 2000. The questions before the district court on remand will be whether a grave risk of harm now exists, and if so, whether that risk can be minimized through an alternative remedy." Gaudin III, at 1036.

2. The facts in this case are set forth in the Ninth Circuit Court's prior opinions, see Gaudin I; Gaudin II; and Gaudin III. For purposes of this petition, the pertinent facts follow, except that Petitioner objects to the Gaudin III Court's "Statement of Facts" for the reason, that the Court stated Respondent's version of the 'facts' of the case and also in its Memorandum Disposition of October 19, 2009, totally ignored the relevant content of the R.60(b) Motion which supported Petitioner's Motion to Dismiss Art.13(b) Defenses which was denied by the District Court, and the Rule 60(b) Motion and supporting material itself, all of which was admitted into evidence below.

Petitioner and Respondent have two children from a relationship that lasted from 1988 until 1992. Gaudin I, 282 F.3d at 1181 (9th Cir.2002).

Petitioner, a resident of Quebec, Canada since January 1994, had legal custody of her two children since their birth and court approved custody since July 27, 1994 pursuant to Hawaii Family Court Stipulated Judgments.

This may be the first Hague Convention Petition where a Petitioner's children were being raised in her home by a Christian Homeschooling Mother. The children were wrongfully retained August 5, 2000 and never returned. Petitioner has chosen to place her faith and trust in God, is appealing to the Supreme Court of the United States, a country founded upon the word of God.

As custodial parent Petitioner has religious beliefs and the exercising of those beliefs in her own home and in the raising of her children, whether her beliefs of Muslim, Catholic or Christian, or other, faith, may not be objected to or interfered with by the non-custodial parent or any governmental authority:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Constitution-Amend. 1

Respondent testified in Family Court that religion is the reason for problems in this world. (App. D. pp. 15-16)

This Petitioner does not believe in "religion". This Petitioner does not "have religion". What this

Petitioner has is a personal relationship with God through belief in his Son, the Lord Jesus Christ.

Petitioner is a born again Christian homeschooling Mother, grounded in the word of God and desiring for her children also to be born again and to be grounded in the word of God. Both boys were being grounded in the word of God and growing well in the Lord.

Petitioner notified Respondent in an April 28, 2000 letter (App. A-1) of her intentions to homeschool both boys in the coming school year, August 2000. Respondent did not respond to that notification. Respondent sent a fax to Petitioner May 27, 2000 announcing his summer plans and his return of the boys August 5. (App. A-2). Respondent picked up the boys June 9, 2000 to commence their regular summer visitation. Petitioner showed the Respondent all the Christian homeschool materials, (home satellite dish, books, and other materials) received from Bob Jones University. Respondent made no comment. Then Respondent called Petitioner July 1, 2000, and told her that if Petitioner did not promise to <u>not</u> homeschool the boys, both then and forever, that Respondent would take all steps necessary to get custody of the boys; and said he would call July 8, 2000 for the answer. There had never been any prior indication by him to Petitioner of dissatisfaction with her custody, and Respondent is an attorney licensed to practice law in the State of Hawaii. Respondent called Petitioner July 8, 2000 and Petitioner responded with a simple "no" to his extortionate demand. Respondent had sent an e mail to Petitioner dated July 2, 2000 (App.A-3), which

Petitioner did not become aware of until July 22, 2000. Respondent indicated again in the e mail that if the children were ever homeschooled, and unless Petitioner enrolled both boys that fall at St. Thomas School where they had been attending, he would attempt to gain custody.

On July 26, 2000, Petitioner filed a Motion for Recognition and Enforcement of the Stipulated Judgments in the Superior Court of the Province of Quebec, Canada, and Respondent was served in Hawaii the same day, July 26, 2000. The very next day, July 27, 2000, Respondent filed an ex-parte motion for temporary restraining order in the Family Court of the First Circuit, State of Hawaii. Gaudin I, at 1181. On the same date, July 27, 2000, the Hawaii Family Court issued a Temporary Restraining Order (TRO) and Order Awarding Temporary Custody of the minor children to Respondent, and set August 31, 2000 for a hearing after notice to Petitioner, to determine temporary custody pending a plenary hearing for change of custody in the future. Gaudin I, at 1181;

On August 4, 2000 at 6am Hawaii time, Respondent called Petitioner and said: "The boys have just seen the top child psychologist in the State of Hawaii, and they have awarded me custody and if you want to do battle, you are going to have to come and do it on my turf." The boys were not returned on August 5, and were never returned.

On August 22, 2000 the Superior Court of the Province of Quebec, Canada, declared the Hawaii

Stipulated Judgments enforceable in the province of Quebec.

On August 28, 2000, Petitioner filed in the Hawaii Family Court a Motion to Decline Jurisdiction and Related Matters.

On August 30, 2000, Petitioner filed a Motion in the Quebec Superior Court for an Order Compelling the Return of the Children, and on October 7, 2000, for an attestation stating that the removal or retention of the children in Hawaii was wrongful under section 29 of an Act Respecting the Civil Aspects of International and Interprovincial Child Abduction, (the Quebec legislation implementing the Hague Convention).

On September 25, 2000, the Hawaii Family Court issued an Order granting Respondent's Motion for Temporary Physical and Legal Custody and Order Denying Petitioner's Motion to Decline Jurisdiction. Gaudin I, at 1182.

3. On November 22, 2000, Petitioner filed a Petition for Return of Children to Petitioner pursuant to 42 U.S.C. 11601 et seq., (The International Child Abduction Remedies Act, "ICARA") in the district court. Gaudin I at 1182.

On November 23, 2000, the Canadian Superior Court of the Province of Quebec issued a judgment rendering an attestation acknowledging that the children had been the object of an international abduction (wrongful removal).

Petitioner's petition in federal District Court was heard on December 8, 2000 and an Order Denying the Petition for Return of the Children was entered on December 11, 2000.

On January 10, 2001, Petitioner filed a Notice of Appeal from the Order Denying Petition for Return of the Children to Petitioner to the United States Court of Appeals for the Ninth Circuit.

On December 7, 2001, Petitioner filed: a Notice of Hearing of Petitioner's Motion to Entertain Motion Under Rule 60(b) to Vacate Order dated December 11, 2000, set for hearing February 15, 2002; and a Notice of Hearing of Petitioner's Motion Under Rule 60(b) to Vacate Order Dated December 11, 2000, Memorandum in support of motion, set for hearing February 22, 2002. (App. D).

On December 26, 2001, the District Court entered an order Denying Motion to Entertain Motion Under Rule 60(b) to Vacate Order and Denying Motion Under Rule 60(b) to Vacate Order (App. E).

On March 11, 2002, the Circuit Court of Appeals for the Ninth Circuit did not determine the merits of the appeal. Rather, the Court remanded the case to the district court in order to determine if Petitioner had moved permanently to Hawaii, as suggested by Respondent's affidavit submitted after briefing in support of his Motion to Dismiss as Moot on the ground that jurisdiction herein did not exist as of October 2001. Gaudin v. Remis, 282 F.3d at 1183 (Gaudin I).

On January 10, 2003, an evidentiary hearing was held and on March 3, 2003 the District Court concluded that Petitioner had moved permanently to Hawaii, and as the court had been instructed to do by the Ninth Circuit, dismissed her petition as moot.

On April 2, 2003, Petitioner filed a Notice of Appeal therefrom to the Ninth Circuit.

On January 28, 2004, after full briefing on the validity of the rule of law created in Gaudin I, shortly before the oral hearing in the pending appeal, the Ninth Circuit panel ordered that a letter brief be filed setting forth Petitioner's current immigration status.

On August 10,2004, the Court rendered its decision, honored the "law of the case," and found that Petitioner was not a permanent resident of Hawaii, and under immigration law could not legally be, reversing the District Court decision, and transferring the case back to the original Appellate panel for its decision on the "merits", urging expedition as the older boy would turn sixteen in two (2) years. Gaudin v. Remis, 379 F.3d 631, 636 (9th Cir. 2004) (Gaudin II).

On January 28, 2005, Respondent moved to dismiss the original appeal a second time on grounds of *res judicata* and abstention, which was denied six months later on July 18, 2005. Gaudin v. Remis, 415 F.3d 1028, 1034 (9th Cir. 2005) (Gaudin III).

On August 22, 2005, the Gaudin III Court vacated the district court's judgment and remanded to the district court.

During the unexplained, but not inadvertent extended pendency of the case on remand, which covered the period from August 2005 to October 2006, Petitioner's first son attained the age of sixteen and, by operation of law, was then outside the purview of the Convention's provision for "return."

On May 9, 2007, the District Court denied Petitioner's Motion to Dismiss Art 13(b) Defenses, the main support for which was the Rule 60(b) motion and material from 2001.

On June 1, 2007, the district court, after opting to forego the mandated "grave risk" and undertaking analysis, (see Gaudin III at 1037) entered its Findings of Fact, Conclusions of Law, and Order Dismissing Petition determining, *inter alia*, that Petitioner's second son was of an age and maturity such that his views should be taken into account, and that said child desired to remain in the United States and objected to being returned to Canada, and that the court would "honor his wishes" and would not order him returned and dismissed the Petition.

Petitioner filed a Notice of Appeal on June 29, 2007 to the Ninth Circuit from the Findings of Fact, Conclusions of Law, and Order Dismissing Petition, and June 5, 2007 Judgment. Following the filing of the Notice of Appeal, Petitioner's second son attained the age of sixteen. Petitioner conceded that this

"aging-out" removes the return obligations under the Hague Convention .

Petitioner's appeal to the Ninth Circuit below sought review by the Ninth Circuit of the district court's failure to address issues raised by Petitioner in proceedings below that remain unresolved, (including her right to have had the boys sent home under her petition and the Hague Convention), as to *inter alia*, Petitioner's right to relief under the Hague Convention from state court custody proceedings and Petitioner's entitlement to attorney's fees and costs.

On October 19, 2009, in an unpublished Memorandum Decision, the Ninth Circuit panel which decided Gaudin I and Gaudin III declared the case "truly moot" because both boys had attained age sixteen (16), ignored all other issues, and decided Petitioner had waived her right to fees under Federal Rule of Civil Procedure Rule 54 (d) (2) by not filing a motion for fees and expenses within fourteen (14) days of the judgment and had not given a reason for failing to do so.

REASONS FOR GRANTING THE WRIT

I. In This Case of First Impression Certiorari Should Be Granted to Determine And/or Clarify The Authority Of A Court, If Any, To Unilaterally Change The Petition In An Action Filed Pursuant to The Hague Convention And ICARA, So That People Will Not Be Discouraged From Using Applications Under The Hague To Vindicate Their And Their Children's Rights.

It is Petitioner's position that Judge King's Decision of June 1, 2007, was predicated on a "law of the case" put forth by the GAUDIN III Court, erroneously and impermissibly changing the Petitioner's case: on November 22, 2000, Catherine Gaudin filed an action in the U.S. District Court under and pursuant to the Hague Convention and ICARA, seeking a Court Order returning them to their place of habitual residence. The Respondent asserted an Art. 13(b) defense that the boys should not be returned to Quebec and their mother's custody because there was a "grave risk of psychological harm". This allegation was supported by an affidavit of a psychologist who said *inter alia*, that return of the two boys to their mother "would result in significant damage to their mental health." GAUDIN III at 1032. That psychologist's "opinion" was cited by the state family court Judge to award temporary custody to Respondent and keep the children in Hawaii for a custody trial; by the Federal District Court as justifying the conclusion of there being a valid art. 13(b) defense of "grave risk of psychological harm" by clear and convincing evidence; and by the Ninth Circuit, who recited the psychologist's declaration as "chief" evidence (notwithstanding the Ninth Circuit knew of an undecided, albeit unfavorably reviewed by the District Court, R.60(b) Motion, "Entertainment" of which was denied by the District Court. The R.60(b) motion is Appendix D to this Petition for Writ of Certiorari, was admitted into evidence by the District court, and was the primary support for Petitioner's Motion to Dismiss Article 13(b) Defenses as a matter of law pursuant to, *inter*

alia, Fed.R.Civ. Proc. Rule 56, which motion was denied by the District Court on May 9, 2007.

The point is that Petitioner had, in the filing of her petition and through proceedings up to and including the hearing on December 8th, 2000, established and proved all she had to, to merit an order of return as to her boys "forthwith." See art. 12, Hague Convention.

Respondent had asserted an art. 13(b) defense of "grave risk of psychological harm," supported primarily by the psychologist's opinion described above. The District Court was required by case law to fashion an "undertaking."Blondin v. Dubois, (Blondin I), 189 F.3d 240,249 (2d Cir. 1999); and Walsh v. Walsh 221 F.3d at 219, see cases and analysis in Gaudin III at1035 and ongoing analysis of "grave risk" in the first place, citing Danaipour v. McLarey, 286 F.3e 1 (1st Cir. 2002) and others. The point is that in the face of the recanting and withdrawal of the psychologist's opinion and her concomitant conclusion that the children could go home to their Mother, the Respondent's art.13(b) defense disappears as a matter of law.

Respondent's art.13(b)defense, even without the psychologist's retraction, is in fact nowhere near or close to cognizable "harm" for Hague purposes: from no complaint of any kind to Petitioner before his July 2-8, 2000 conduct concerning "homeschool," about which he subsequently testified he knew "nothing," (App. D p.20); to a July 27, 2000 written declaration submitted to the family court for obtaining a TRO; Respondent went from 'ok' to bring the boys back home August 5, up to July 8, 2000,

and then nineteen days later, filing a declaration that it is not 'ok' to bring the boys back home August 5 (what happened between July 8, 2000 and July 27, 2000, such that the boys could not be brought home to their Mother (?)); to the development of a litany of complaints, such as were revealed in Gaudin III's recitation of facts (the Respondent's version). Once the psychologist's true opinion is recognized, that she did not render an opinion, that the boys could go home to their mother, that she told respondent at the outset that she would not under any circumstance, testify (and all this testimony also negated the GAL report).(App.D-19,34-44,53-55) one cannot escape the fact of misleading and fraudulent conduct. Given the purpose and goals of the Hague Convention, the remaining stated reasons for a "grave risk of psychological harm" amount to no more than ordinary "custody" considerations which are NOT to be used or given any weight in the Court's Hague return/grave risk analysis. (App.J art.16) See Gaudin III, at 1034-1007 re the case law, concerning "grave risk".

A cursory look at Respondent's evidence of "grave risk," using Gaudin III's survey of facts, without the psychologist's declaration or the guardian ad litem's report, reveals:

> Religious obsessions, meaning what?
> Objection to mother's rules:
> Not allowed to watch television
> Not allowed to play sports
> Bible study in the afternoons—were not allowed to sleep in same bedroom, not allowed to celebrate holidays (Halloween)

Not allowed to attend sleepovers or birthday parties

Had to spend six hours traveling to and attending church each week, had to wear home-made clothes that were "unusual" to school.
They also reported that life with their father is fun. Gaudin III at 1032-1033.

All of the foregoing is within the range of activities governed and managed by a conscientious parent of two boys, seven and nine years old. The nature of complaints reveals the possibility, if not probability, of parental alienation practiced by Respondent, who did not support any belief in (religion) God, a veritable "Disneyland dad". In fact, the psychologist expressed concern about "alienation" by Respondent in this case. (App. D p. 14).

Whatever view of the foregoing one wishes to take, under the Hague and the cases cited, including Gaudin III's legal analysis, it is clear that the above FACTS ON THEIR FACE DO NOT, AND CAN NOT, AMOUNT TO GRAVE RISK OF PSYCHOLOGICAL HARM. See Friedrich,78F.3d (CCA 6 1996) Blondin v. Dubois (Blondin II), 238 F.3d 153,163 n.11 (2d Cir.2001); Walsh v. Walsh,221 F.3d 204,218 (1st Cir.2000) Mozes, Danaipour v.McClarey, A v. Central Authority for New Zealand, and Sonderup v. Tondelli, *supra* all cited and analyzed in Gaudin III at 1034-1037. They are all garden variety and ordinary considerations of approval, disapproval in raising children, depending on a parent's point of view.

There are NO cases where "grave risk of psychological" harm was the basis for a court NOT TO RETURN the children involved, unless there was also present physical abuse or sexual abuse. There was not such abuse in this case, nor was there any alleged. That was true and was argued in 2000, and it is true today.

Petitioner's cause of action was well stated; proved her entitlement to a return Order on December 8, 2000. Respondent's assertion of an Art. 13(b) defense depended most heavily on the affidavit, but because of the Court's erroneous interpretation of the Hague Convention/ICARA, he refused to look at an "undertaking." Had there been grave risk, fashioning an undertaking would have been simple.

Everything in the case, up to Gaudin III was Petitioner's being "forced" to defend herself in Hawaii Family Court with a Court that accepted the District Court's "invitation," with an agenda relative to Petitioner. Then trying to file her Rule 60(b) Motion under the Ninth Circuit's arcane procedure, to be thwarted erroneously by the Court's denial in December 26, 2001, to "entertain" the Motion to Entertain R. 60(b) Motion to Vacate Order of December 11, 2000.

The case stayed on appeal from January 10, 2001, until August 22, 2005. The Gaudin III court's ordering the District Court to change the dates as of which the "grave risk" determination was to be made, adversely changed her entire case instantly. The Court's doing this with no citation to source or authority is the second of three times it has done

this: Gaudin I, Gaudin III, and Gaudin IV. The defense of suitable "age and maturity" in art.13(b) was asserted in 2000, not used (the younger boy was 7 years old) and for purposes of Petitioner's ongoing case thereafter waived and barred.

The Gaudin III's "change" in effect dismissed Petitioner's case by instructing the District Court to ignore what had occurred in the case initially that was awaiting post-appeal completion, as all cases in that status are. After all, this opinion and decision was the first addressing the original erroneous decision of the District Court on December 11, 2000, four years and seven months earlier. Further, the appellate court knew of the R. 60(b) Motion and the truth of the psychologist's affidavit. Thus, the Court knew that changing the date to determine "grave risk of psychological harm" precluded the Rule 60 (b) Motion from being relevant, precluding it from being granted. The Court had no "brief" to do that to any litigant's cause of action. It puts the Court in the position of deciding the entire case in favor of the "wrongdoer," originally and continuing right up until Gaudin III's decision, rewarding and benefitting him based on no source and no authority. There is no authority because such action is unjust and prejudicial, destroying the Court's impartiality.

II. The Court Should Grant The Writ Of Certiorari To Make Clear That The Hague Convention/ICARA 'Wrongdoer' Will Not Be Allowed To Receive Any Benefit From His Wrongdoing Including Using Any Advantage Or Defense That Might Otherwise Be Available But For The Wrongdoing.

Because of Respondent's conduct in this case, he is estopped equitably from invoking (and therefore the court is as well) the "age and maturity" defense. In a case directly applicable, Belay v. Getachew, 272F.Supp2d 553 (D.Mdl 2003), where Respondent wrongfully abducted her child and fled, hiding from Petitioner—father for three years. When he found them, he filed for a return under the Hague Convention. The Court determined that the mother wrongfully removed the child, but that she had established that the child was well settled in its new environment. The Court held that although the mother had established the "well-settled" defense (under article 12, available where petitioners file for return more than one year after wrongful abduction), nonetheless equity demanded that the child be returned because the child only became well-settled as a result of mother's concealment of their whereabouts. The Court held that to allow an article 12 defense would warp the intention of the Convention by rewarding behavior it specifically seeks to deter.

Although art. 13(b)(2) is not an art. 12 defense, the Belay v. Getachew, 272F.Supp2d 553 (D.Mdl 2003), case applies to this case. The fact of the matter is that, were it not for his wrongdoing as to retention and the insufficient and false art. 13(b) assertion, this case would have been over with on December 8, 2000. A great deal of money and effort would not have been expended for what was, at most, a garden variety custody dispute. (App. A-3) If the Hague had been followed, there could have been a custody trial (not in the place of the wrong doer's

habitual residence, but in the place of the childrens' habitual residence), in Quebec, Canada in 2001 (or none at all if Respondent so chose), and if the situation was proven to be a substantial change in circumstances from when custody was originally decided, and the situation so required his boys be with him, then so be it. He chose not to obey the law—his willfulness was and is WRONGFUL. The reward the Respondent obtained by being wrongful throughout this litigation cannot be undone: he kept the "boys" for the last ten (10) years, June 9, 2000, until June 23, 2010, when the younger son turns eighteen years of age. The use of the "age and discretion cannot be allowed in cases such as this.

III. The Court Should Grant The Writ Of Certiorari To Inform The Courts, The Bar, And The Public That "Grave Risk" Is Very Serious, Narrowly Construed And That Attempts to Ignore The Law's Requirements Will Not Be Countenanced And Will Have Negative Consequences.

A very recent case is illuminating in the area of "grave risk" and wrongdoer's attempts at Court manipulation to achieve a result not intended by the Hague Convention. Chief Judge Kozinski of the Ninth Circuit Court of Appeals, in a Hague Convention case, indicates the standard of review of District Court's factual findings is to be for clear error, but to determine de novo whether those facts establish a grave risk of harm, citing Mozes, 239F.3d at 1073; Silverman v. Silverman, 338F.3d. 800,896 (8th Cir.2003). Cuellar v. Joyce, No. 09 35068 (9th Cir. 2 19 2010) (Emphasis added). The Gaudin III Court specifically declined to do a de novo review,

apparently because it decided what happened in Court at the time this case was heard was of no consequence, but doing so was in fact in total derogation of the Hague Convention, ICARA, and Petitioner's rights thereunder. If it had done the appropriate appellate review, it would have to have instructed the lower court to send both boys back to their place of habitual residence. Gaudin III at 1036.

Judge Kozinski reviews the status of art. 13(b) defenses of grave risk of physical or psychological harm ably and in terms that apply here. The district court there also denied relief (refused to return the child), Cuellar v. Joyce, No. 09-35068, (9th Cir, 2-19-2010).

The Court's remarks apply directly to this case. "Custody" is NOT a consideration. Who would be a better parent is NOT a consideration. Fitness of a parent is a custody matter. Mozes v. Mozes, 239F.3d 1067,1070 (9th Cir.2001). The Court also stated that the art.13(b) exception ("grave risk of physical or psychological harm") "is not a license for a court in the abducted to country to speculate on where the child would be happiest." Cuellar v. Joyce, No. 09-35068 (9th Cir, 2-19-2010) op cit at 2, citing Gaudin III quoting Friedrich v. Friedrich, 78F.3d 1080, 1068 (6th Cir. 1996).

The Appellate Court in Cuellar v. Joyce, No. 09-35068 (9th Cir, 2-19-2010) decided the issue of whether there was a grave risk and ordered a return of the child from the bench, obviating any further delay.

Petitioner here was entitled to the same. The result is the wrongdoer is still a wrongdoer, got what he wanted as a result of his wrongdoing. Petitioner is left with over $100,000 in debt to Respondent because of a Family Court trial that never should have taken place in the first instance and was in derogation of a proper Hague proceeding. As the Gaudin III court said, "while the district court has the authority to vacate state custody orders if necessary, see Mozes v. Mozes, 239 F.3d at 1085 n.55, it may do so only to ensure that the Convention's purposes are not frustrated." (Emphasis added). Petitioner is entitled to a *vacatur* order by the federal court to restore her to her pre-abduction status quo, wiping out court monetary orders that should never have taken place. Since the boys are, for all intents and purposes, both the age of majority, the Court below could fashion the *vacatur* in some way. In any event, Petitioner is entitled to the fees and costs expended by her pursuant to the Hague/ICARA laws and what would have been her complete success were it not for Respondent's wrongdoing. Even if there were erroneous court decisions, all came about because of Respondent's original wrongful retaining of the children, followed by wrongful conduct designed to fool all involved as to the seriousness of the "grave risk of psychological harm" which was alleged, but which was NOT SO. There are legions of cases announcing the principle that wrongdoers may not benefit from their wrong-doing, and none found to the contrary. The Hague itself does not provide that respondents/wrongdoers are entitled to fees, yet the state court here awarded fees against Petitioner without regard to the Hague Convention or its non-cooperation with a Hague

Petitioner. In Belay v. Getachew, 272 F. Supp. 2d. 553 (D.Md.2003), the Court refused to allow a "well-settled" defense under art. 12 because, although in fact "proved," it was due to the respondent's wrongdoing. If the defense were allowed, the court felt it would warp the intention of the Convention by rewarding behavior it specifically seeks to deter. Id. Here the reward has already been received and fully enjoyed by the wrongdoer and because of his wrongdoing, Petitioner has been denied her rights and the result to which she was entitled. This case, and all such cases in the future, requires that petitioners be recompensed by wrongful respondents. Nothing less will bring home the singular purpose and goal of the Hague Convention.

IV. The Court Should Grant The Writ of Certiorari To Establish and Clarify That Relief Under The Hague Convention And ICARA Includes The Court's Authority To Fashion Relief To Avoid Results That Are In Derogation Of The Purpose And Existence Of The Hague Convention Or Contrary To Its Letter And Spirit.

Part of the relief requested of the district court was a vacation of state proceedings.

The status of the case when Gaudin III was decided was as follows: Respondent was still an adjudicated "wrongdoer" by the courts of Canada and the United States. Further, Petitioner had proved her Petition and qualified for all relief afforded by the Hague Convention and ICARA. The District Court's finding of grave risk of psychological harm

not only could not be sustained because of the admissions contained in the Rule 60(b) Motion and Memorandum in Support, but also based on Gaudin III alone, there was no grave risk of psychological harm by clear and convincing evidence at all. See Reason for Granting the Writ No. I, *supra*.

Petitioner submits that the fact that the children have turned sixteen does not preclude the granting of relief to Petitioner. Church of Scientology of California v. United States, 506 U.S. 9, 12 13(1992) (ruling that case was not moot where a court "can fashion some form of relief").

Petitioner recognizes that the children turned sixteen effectively ending the return obligation under article 4 of the Hague Convention. See Public Notice 957, 51 No. 58 Fed. Reg. 10494, 10509 (stating that "Articles 4, 35 and 12 place time limitations on the return obligation"). However, Petitioner submits that her remedies for Respondent's breach of custody rights remain in force. Elisa Perez-Vera, Explanatory Report f 75, in 3 Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 449 (1982) ("Explanatory Report"), available online at http://www.hcch.net/upload/expl28.pdf (explaining that Article 4 "concerns only the Convention's scope *ratione personae* as regards the children who are to be protected") (emphasis added); Hague Conference On Private International Law: Overall Conclusions Of The Special Commission Of October 1989 On The Operation Of The Hague Convention Of 25 October 1980 On The Civil Aspects Of International Child Abduction, 29 I.L.M. 219, 223 (March 1990) (opining

that "while Article 4 makes it clear that the obligation to apply the Convention ceases at the day when the child reaches the age of 16, nothing in the Convention prevents States from applying the Convention's mechanisms under its own laws in cases in which the child has attained the age of 16").

As noted above, article 4 was meant only to preclude the return of abducted children upon attaining the age of sixteen and not to render moot any remedy that a petitioner is entitled to under federal or state law or in equity. It is well-established that "[t]reaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." Asakura v. City of Seattle. 265 U.S. 332, 341 (1924) (citing Hauenstein v. Lynham. 100 U. S. 483, 487 (1879); De Geofroy v. Riggs. 133 U.S. 258, 271 (1890); Tucker v. Alexandroff. 183 U. S. 424, 437 (1902). 42 U.S.C. § 11603(h) further provides that "[t]he remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements."

Hence, Petitioner should not be precluded from the relief she seeks. Certainly, it is unfathomable that the drafters of the Convention would intend preclusion of relief under these circumstances. See Smith v. Maryland, 10 U.S. 286, 294 (1810) ("No construction of a treaty is to be admitted which leads to an absurdity, or renders the treaty null and without effect"); Distribuidora Dimsa v. Linea Aerea Del Cobre S.A.. 976 F.2d 90 (2nd Cir.

1992) (stating that "the plain language of a treaty must be followed, but only if the language is unambiguous or if the plain meaning does not produce 'necessarily absurd' results" and that "treaties, like other documents, occasionally are not drafted with such clarity as to remove all ambiguity or doubt as to the meaning of certain provisions") (citations omitted). The resulting effect of withholding remedies would be the obliteration of the Convention's goals of speedy disposition and prevention of wrongful abduction and forum shopping.

Petitioner respectfully submits that the Convention mandates that state courts refrain from determining custody issues pending resolution of the Convention proceedings in its proper forum. The plain language of Article 16 of the Convention states, in pertinent part, as follows:

> *Article 16*
>
> After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Hague Convention, art. 16, 19 I.L.M. at 1503 (Emphasis added).

Petitioner in this case "did not bring her ICARA claim before the Hawaii courts; instead, she chose to exercise her right to seek relief under ICARA in federal court..." The plain language of the Convention is sufficiently clear in its directive that any custodial determinations shall not be made until the question of proper forum, either in the place of the minor(s) "habitual residence" or the place where wrongfully abducted or retained, is resolved under the Convention. See Sale v. Haitian Center Council's Inc., 509 U.S. 155, 194 (1993) (stating that "[i]t is axiomatic that a treaty's plain language must control absent 'extraordinarily strong contrary evidence.'")

In applying article 16 of the Convention, the Court in Mozes v. Mozes observed that a state court's entry of an award decree, rendered during the pendency of the appeal, was "premature." Mozes v. Mozes, 239 F.3d at 1085 n.55. The Court suggested that, on remand of that case, the district court "take appropriate steps to ensure . . . compliance with the Convention." Id. at 1085.

The Mozes Court further noted that "where Congress has specifically granted jurisdiction to the federal courts...[they] must have the power to vacate state custody determinations and other state court orders that contravene the treaty." Id. The commentary to Article 17 of the Convention, which concerns the existence of a state custody order rendered while issues touching on the Convention

remain, provides further support of Petitioner's position on this issue:

> "[T]he competent authority of the requested State will have to regard the application for the child's return as proof of the fact that a new factor has been introduced which obliges it to reconsider a decision which has not been put into effect or which was taken on the basis of exorbitant grounds of jurisdiction, or else failed to have regard to the right of all the parties concerned to state their case."

Explanatory Report ff 13, 16, at 426 (emphasis added).

The state court "accepted the district's court invitation to determine if there was "grave risk of psychological harm," see Gaudin III at 1033, and ordered over Petitioner's objection months of briefing Hague Convention issues, demonstrating noncooperation and interference with the Hague process and, even though "invited" by the district court, tainting its process, which was in any event subordinate to the Hague outcome.

As a result, Petitioner also has had to carry the burden of being ordered by the state court to pay for the "wrongdoer" Respondent's attorney's fees and costs for proceedings that were premature and/or inappropriate. Petitioner "would suffer collateral legal consequences if the actions being appealed were allowed to stand." Pub. Utilities Comm'n of the State of Cal. v. F.E.R.C., 100 F.3d 1451, 1460 (9th Cir.1996). The unpaid state court's Judgment for

Respondent's award of attorney's fees now exceeds $50,000.00.

Such a burden is manifestly unjust and unfair, given the undisputed fact of Respondent's wrongful retention of the children. Gaudin III, 415 F.3d at 1036 (stating that "the primary purpose of the Hague Convention and ICARA is to *prevent* parents from wrongfully taking children across national borders in order to shop for a friendly forum in which to litigate custody" and observing "**[that], by all appearances, is exactly what happened here**") (italics emphasis in original)(Emphasis added). **To do otherwise, would be to reward Respondent's wrongful actions that stem from a simple disagreement over the prospect of homeschooling.**
(App. A-1,2, 3)

"The Convention seeks to deter parental abductions by 'depriving the abductor's actions of any practical or juridical consequences,' and thus eliminating the 'primary motivation' for the abduction - to obtain an advantage in custody proceedings by commencing them in another country." Holder v. Holder, 305 F.3d 854, 860 (9th Cir.2002) (emphasis added) (quoting Mozes, 239 F.3d at 1070); see also In re Vernor, 94 S.W.3d 201, 207 (Tex. App. 2002) (stating that "[t]he Convention operates to restore the status quo as it existed before the wrongful removal of a child in a signatory nation") (emphasis added) (citing England v. England, 234 F.3d 268, 271 (5th Cir. 2002)).

Accordingly, it was imperative for the district court to "take appropriate steps to ensure compliance

with the Convention," Mozes v. Mozes, 239 F.3d at 1085,(9th Cir. 2001) by granting Petitioner's post-Gaudin III request for vacatur of the state court judgment. Not only would such measure be prudent, but mandatory upon the district court to observe. As stated by the U.S. Supreme Court in Sanchez-Llamas v. Oregon, 548 U.S. 331, 347 (2006)

> Of course, it is well established that a self-executing treaty binds the States pursuant to the Supremacy Clause, and that the States therefore must recognize the force of the treaty in the course of adjudicating the rights of litigants. And where a treaty provides for a particular judicial remedy, there is no issue of intruding on the constitutional prerogatives of the States or the other federal branches. Courts must apply the remedy as a requirement of federal law.

(Emphasis added) (citation omitted).

The point is that **Petitioner "won" her case.** The District Court's decision of December 11, 2000, was clearly erroneous on its face in several regards.

The further point of Petitioner's "winning" her case is that the District Court denied a Rule 60(b) motion to Vacate and a Motion to Entertain a Rule 60(b) Motion to Vacate by Order dated December 26, 2001, in which the court recited his review of the material and that he saw nothing that would cause him to change the original result. (App. E-3).

In this case, the proceedings on May 30, 2007 were to determine where the appropriate place for proceedings was to be and did not rule on Petitioner's petition as filed because the appellate court mandate limited the district court to looking at circumstances present only after August 22, 2005; that is, Petitioner's Motion Under Rule 60(b) to Vacate Order Dated December 11, 2000, "entertainment" of which was denied by the district court, was predicated on testimony under oath and subject to cross-examination that clearly would have resulted in a finding of no "grave risk of psychological harm," deceptive and fraudulent conduct of the "wrongdoer" and his witness, and, in any event, by withdrawal of the psychologist's "opinion" in her affidavit and her admission that **the children could go home to their mother which would have resulted in their return to their habitual residence in early 2002.** (App.D- 37).

Instead Gaudin III, having known of the existence of the R.60(b) Motion and part of its contents, since October 2001, ignored its meaning, [1] ignored that Petitioner "won" her case, proved her Petition, with or without an undertaking, and decided that whatever the situation was **at the time of the wrongful retention (August 5, 2000)**, was

[1] This included the recitation in Gaudin III that, "chief" among several pieces of evidence submitted by Respondent were the declaration and a letter by a psychologist and a report of a guardian *ad litem* (GAL)appointed by the Hawaii Family Court. This panel knew the purported meaning of the Rule 60(b) Motion, through multiple references in filings before its 2005 Gaudin III decision, and not only ignored it, but by its action created "a law of the case", so the district court was supposed to ignore it as well.

irrelevant to what it "suggested" had to take place "now" (on August 22, 2005). Aside from the fact that both minor children are now more than sixteen years years of age and Respondent has, through baseless motions, (five of them, only one successful the "created" rule announced in Gaudin I), and the court through court business, erroneous decisions, inexplicable delays, and apparent unawareness of the goals and purpose of Hague proceedings, managed to use up what is now nine and one-half full years since Petitioner filed her Petition on November 22, 2000. "The Hague Convention does not allow abducting parents to resort to courts in order to thwart return of the child to its habitual residence. District courts considering Hague Convention cases are cautioned not to allow abducting parents to manipulate judicial process for purpose of delay..." See Cuellar v. Joyce No. 09-95068, Feb.19, 2010 (9th Cir. 2010)(Emphasis added)

The reality is that the place where any custody proceedings was to take place, if there were any, was not determined by court action, but rather, erroneously but unchallengeably, because of the age of the children involved. For that reason, and the other reasons herein articulated, the 2000 and following state court proceedings should have been vacated to at least partially vindicate the Hague.

Part of the relief requested of the district court was for the fees and expenses incurred due to Respondent's wrongdoing.

The Ninth Circuit Court of Appeals in its unpublished memorandum decision dated October

19, 2009, summarily dismissed Petitioner's claim for attorney's fees and costs because a Motion was not filed pursuant to Fed.R.Civ.Proc.54(d)(2).

Before responding to the appellate court's erroneous conclusion, Petitioner wishes to outline her position on her entitlement to fees, notwithstanding the "return" remedy is unavailable due to the "aging out" (turning sixteen years of age) of the children. Then Petitioner will respond directly to the court's decision.

Article 26 of the Convention provides protections from the consequences of abduction by providing for legal fees and reimbursement of expenses in the following manner:

> Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Convention, art. 26, 19 I.L.M. at 1504.(Emphasis added).

The Convention speaks of the protection and preservation of existing custody rights. See generally

Explanatory Report at 447, ¶71 (stating, among other things, that "the intention is to protect all the ways in which custody rights can be exercised"). There is no doubt that drafters of the Convention intended to protect holders of custody rights against the wrongful removal of children from their habitual residence. There is also no doubt that the district court's June 1, 2007 Order Dismissing the Petition concerned the rights of access of Petitioner. See Convention, art. 5, 19 I.L.M. at 1501 (defining "right of access" as "the right to take a child for a limited period of time to a place other than the child's habitual residence"); Explanatory Report at 452, (explaining that the definition of "rights of access" is "not intended . . . [to] exclude all other ways of exercising access rights.").

The Ninth Circuit's unpublished opinion of October 19, 2009 ignored all points raised by Petitioner appellant, including all of the foregoing analysis and position. The Court declared that because the two boys were 16 years of age "this matter truly [is] moot." Gaudin II, at 638 (9th Cir.2004), apparently cited because the Gaudin II court, in dictum (there being no issue before/them) said that the case would be "truly moot" if the boys turned sixteen (16). In any event both courts assumed their conclusion, and Gaudin III in doing so ignored the issues raised here.

The Gaudin IV court declared, as follows:

> "...Gaudin asks this court to award attorneys' fees. Such a motion generally must be filed before the district court no later than fourteen

days after entry of judgment. See Fed.R.Civ.P. 54(d)(2);D. Haw. Local R.54.3(a). Gaudin filed no such motion, and offers no explanation for this omission. Since she failed to request fees before the district court, she has waived this claim."

In response to the Court, Petitioner states that research reveals that, although some statutes (including Rule 54(d)(2), (Fed.R.Civ.Proc.) do not expressly limit fees to "prevailing party," nonetheless the case law generally is that fees may not be awarded to a plaintiff who obtains no relief. 10-54 Moore's Federal Practice, Civil 54.171, Matthew Bender (3d ed.) There are some "seeming" exceptions (e.g., Civil Rights Actions), but the Hague Convention/ICARA are not statutorily excepted, and there is no case law in the Hague/ICARA context arisen to date. Even the "exceptions" alluded to do not really allow fees unless some "success" is manifest or public policy supported. Id.

In the instant case Petitioner's position was clear from Gaudin III's rendition through the District Court's June 5, 2007, Judgment, and thereafter on appeal: Petitioner was entitled to a "return" order, a *vacatur* of state proceedings, and attorneys fees and expenses. This was reflected in her Trial Brief, proceedings leading to the May 30, 2007, hearing and her Motion to Strike Format, To Strike All Declarations and To Dismiss Article 13(b) Defenses, as a matter of law. This last was specifically predicated on all the material in the Rule 60(b) Motion to Vacate December 11, 2000 Order. All motions were denied, all objections at the hearing,

which included a "running objection" throughout were denied. All objections and arguments as to custodial testimony, tainted declarations, all factors required to be assessed by Gaudin III (and the case law cited therein) were denied or overruled.

The point is that attorneys fees and expenses were asked for as substantive relief, established as to entitlement before Judgment and as part of it. That was denied. Regardless of Petitioner's position and justification, the District Court did not agree At all. Therefore, the Ninth Circuit's invoking Rule 54(d)(2)'s requirement that this Petitioner file a motion for fees within fourteen days of Judgment is not only misplaced, but in context, difficult to comprehend: the unauthorized changing of a party's case and the suggestion of use of a defense waived and/or inapplicable six and one half years earlier, resulting in the loss of Petitioner's rights under the Hague Convention/ICARA, so that on June 1, 2007 she could certainly know that she had prevailed in nothing. To then ignore all of Petitioner's points on appeal in an unpublished Memorandum Disposition and to cite R.54(d)(2) in denying attorney's fees means that Petitioner did prevail in something or else it would not have brought Rule 54 (d)(2) up, however the Court did not identify any area in which Petitioner prevailed. Alternatively, perhaps the Court wanted to insure that the thought of entitlement to any attorneys fees was foreclosed in any event. That is not the law.

The rights of Hague Convention/ICARA petitioners are to be protected against all incursions by wrongdoers. Petitioner requests that the Court

fashion relief within existing parameters of court authority in equity and in law, so that wrongdoers are deterred from engaging in conduct contrary to public policy.

CONCLUSION

For the foregoing reasons we respectfully request that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

Paul A. Lynch
Counsel of Record
Paul A. Lynch LLC
P.O. Box 1911
Waianae , HI 96792
(808) 696-4646

Attorney for Petitioner

APPENDIX

A. Gaudin to Remis.....4-28-00..... A-1-2
Remis to Gaudin.....5-27-00.....A-3-4
Gaudin to Remis .....7-02-00.....A-5-6

B. Hi.Family Ct. Order.....9-25-00.....B-1-4

C. District Court Decision...12-11- 00.....C-1-13

D. Notice of Hearing of Petitioner's
Motion To Vacate Order Dated
12-11-00; Petitioner's Motion
Rule 60(b) to Vacate Order
Dated 12-11-00.....12-07-01..... D-1-95

E. District Court Order.....12-26-01.....E-1-3

F. District Court Order.....5-09-07.....F-1-6

G. District Court Order..... 6-01-07.....G-1-12

H. Ninth Circuit Memorandum
Decision..... 10-19-09.....H-1-4

I. Ninth Circuit Order.....12-14-09.....I-1-2

J. The Hague Convention On The Civil Aspects
of International Child Abduction.....J-1-23

K. International Child Abduction
Remedies Act.....K-1-20

28 avril 2000

Hi There Pa! How are you doing? The boys are doing fine. Thank you for their Easter package. We are enjoying our Bible Time "Easter Series", Enclosed are their school reports. Please iet me know by in writing, by fax or mail... once you have your travel confirmations and your summer plans with the boys set.
For their medical insurance Village Travel 450-458-7041.
How do you feel about this? .. John? In my estimation, it is of highest priority that our boys receive a Christian education, i am in the process of making arrangements for their Home Schooling for Grade Five and Grade Three. I am planning to use the Bob Jones University Home School curriculum including their HomeSst program. I have asked thst they send you their curriculum catalogues and the video on the Home Sst. I plan to supplement their curriculum with French grammer and perhaps some Canadian geography in French. Our pastor and his wife, Paul and Kim Pelletier, whom you met, began Homeschooling using the Bob Jones University Curriculum last year. His children are in the same grades as ours. My half sister, Gloria Repp, a Christian author and writer of numerous books, works for the Bob Jones University Press and from what! understand, writes some of their curriculum

reading material. The boys are already reading and enjoying a few of her books! We are looking forward to this new and exciting experience! Take care of yourself, John, Aioha, Catherine.

fsaiah 54:13 "And all thy children shalf be taught of the Lord; and great shall be the peace of thy children." Esai'e 54:13 Tous tes fris seront disciples de J'Eterngl, Et grande sera la prosperite de tes fils."

Dear Catherine,

Seems Johnny is experiencing more than growing pains. Did the Dr. do an EKG? Most of the heart tests I've read about probe blockage of vessels which is mostly unlikely for Johnny. Have you been reffered to a cardiologist? My Dad died of cardiac arrest. A diagnosis of angina was made in 1972. Prior to that Dad has chosen the Dr. Atkins diet and indulged in bacon and other fatty foods with relish. Of course, he smoked 3 packs of cigarettes a day. After the diagnosis, Dad changed his diet completely and undertook daily exercise. In 1991, the average life expectancy for a white male was 73. My last full half-day physical in 1998 led to a comment by the Dr. that I had the internal chemistry/function of a 25 year old.

I'll be in Hudson on 6/10, about 9:00 A.M. our itinerary will be similar to years past. We'll leave Grandma's on 6/20. Classes begin 6/19 and the school knows the boys will start 6/21. Classes run from 8-12. Unless court intervenes, I shall pick the guys up and spend the balance of the day with them. Our Big Island visit has not yet been set. We'll arrive back in Hudson 8/5. You will be called 4:30 on Saturdays. I shall have the usual health insurance secured thru Village Travel on 6/5 and ask that they call you for pick-up.

Thank you for my traditional birthday song and the boys for their cards. Seems there has been a nagging cold/sore throat bug in The Islands. Just when you think it's gone, it bites again.

Mom is doing well with her gardening, weather permitting.

Aloha for now,

Subj: CUSTODY/HOMESCHOOL
Date: 7/2/00 5:32:50 PM Atlantic Daylight Time
From: JRRHNL
To: AyezFoiEnDieu cg

DEAR CATHERINE, IT IS MY FIRM BELIEF THAT IT IS NOT IN THE BEST INTEREST OF JOHN ANOLANI REMIS, IV AND ANDREAS WAILANI REMIS TO BE HOME SCHOOLED. IT IS ASKED THAT YOU CONSIDER A CHANGE IN CUSTODY NOW. IT IS FURTHER REQUESTED THAT YOU ADVISE ME AS TO WHETHER OR NOT YOU WILL CANCEL YOUR PLANS FOR HOME SCHOOLING THIS COMING YEAR AND FOREVER. I ASK YOU ENROLL JOHN AND ANDREAS IN ST. THOMAS FOR THE FALL. YOUR RESPONSE IS REQUESTED BY 7/8/00. IF YOU DO NOT AGREE, I SHALL TAKE ALL STEPS REASONABLE AND NECESSARY TO EFFECT A CHANGE OF CUSTODY OF OUR SONS. THEIR WELL-BEING IS PARAMOUNT. ABSENT YOUR COOPERATION, I SHALL ASK THE PROPER COURT TO HAVE YOU SUBJECTED TO A PSYCHIATRIC EVALUATION AND ASK THE COURT TO HOLD YOU RESPONSIBLE FOR THE COSTS AND ATTORNEY FEES NECESSITATED BY YOUR LACK OF COOPERATION. I AGREE TO BEING SO EVALUATED WITHOUT A COURT ORDER. IT IS MY UNDERSTANDING THAT I MAY SECURE AN EMERGENCY CHANGE OF CUSTODY UNDER THE CIRCUMSTANCES. YOUR SILENCE THROUGH 7/8/00 WILL BE DEEMED A NEGATIVE RESPONSE. IN THAT EVENT, PLEASE HAVE YOUR ATTORNEY COMMUNICATE WITH ME. TRUSTING YOU

WILL FAVORABLY CHANGE YOUR POSITION AS TO HOME SCHOOLING, I AM, VERY TRULY YOURS, JOHN R. REMIS, JR

IN THE FAMILY COURTOF THE FIRST CIRCUIT
STATE OF HAWAII

CATHERINE JANE VON KENNEL GAUDIN	)	FC P 93-0625
	)	ORDER GRANTING
	)	DEFENDANT'S MOTION
Petioner,	)	FOR TEMPORARY
	)	PHYSICAL AND LEGAL
v.	)	CUSTODY AND ORDER
	)	DENYING PLAINTIFF'S
JOHN R. REMIS, JR.,	)	APPLICATION TO
	)	DELCINE JURISDICTION
Defendant.	)	
	)	Hearing: 8/31/00 & 9/11/00
	)	Time: 8:30 a.m.
	)	Judge: John C. Bryant, Jr.

ORDER GRANTING DEFENDANT'S MOTION FOR TEMPORARY PHYSICAL AND LEGAL CUSTODY AND ORDER DENYIG PLAINTIFF'S APPLICATION TO DECLINE JURISDICTION

Defendant, John R. Remis, Jr., having moved this Court for an Order granting sole legal and physical custody over the infant issue of the parties herein to wit JOHN ANOLANI REMIS IV, born 9/17/90 and the Plaintiff having moved this Court to decline jurisdiction in this matter and the hearing upon said motions having come on to be heard before this Court on 8/31/00 & 9/1/00, and John R. Remis, Jr. having appeared pro se. and Catherine Jane Von Kennel Gaudin having appeared through counsel, Geoffrey Hamilton, and the Court having considered the

arguments of counsel and the papers and exhibits on file herein and the Court having conferred with Judge Pierre Isabelle of the Superior Court of the Province of Quebec, Canada Court finds as follows:

1.) It is clear that both Hawaii and the Province of Quebec have jurisdiction in this matter and that there are substantial contacts in both jurisdictions with regard to the issues before the court.

2.) The parties by early agreement designated Canada as the venue for a hearing of any dispute between them on the issues before the Court. However, this Court finds that such an agreement between parties cannot confer jurisdiction when such an agreement operates against the best interest of the children.

3.) This Court finds that it is not in the best interest of the children to return them to mother at this time. The Court further finds that a grave risk exists that the children will be psychologically harmed if they were returned to their mother. This Court especially believes this risk exists as to the content of the proposed home schooling of the children, and more significantly, based upon the report of Dr. Susan A. Lehrke, that the childrens' mental health is under severe stress and the children are both extremely angry with their mother.

WHEREFORE IT IS HEREBY ORDERED, ADJUGED AND DECREED that:

A.) The issues of permanent custody and visitation will be decided by the Family Court of the First Circuit in th State of Hawaii.

B.) This Court denies the request of the petitioner to decline jurisdiction.

C.) This Court grants the Defendants Application and awards temporary sole physical and legal custody of JOHN ANOLANI REMIS IV, born 9/17/90, to his father, John R. Remis, Jr. pending the final determination in this action.

D.) The trial schedule is as follows and will be consolidated with FC-P 93-0925:

1.) November 14, 2000: exhibits lists, witness lists and pre-trial statements to be exchanged between the parties, and submitted to the Court;

2.) November 21, 2000 at 10:30 a.m.: Pre-trial Conference with attorneys only, before Judge R. Mark Browning

E.) Maranita Lopez, Esq., is herby appointed as Custody Guardian Ad Litem. There shall be a $5,000.00cap on the CGAL fees. The CGAL's report shall be filed by the date of the Pre Trial Conference. Both parties are ordered to cooperate with the CGAL. Each party is ordered to pay$1500.00 as an advance on the CGAL fees no later than November 1, 2000. Further payment of CGAL fee is reserved for trial.

F.) The Plantiff's application for attorney's fees will be reserved for tial.

DATED: Honolulu, Hawaii, SEP 25 2000

/s/
JUDGE OF THE ABOVE-ENTITLED COURT

GAUDIN v. REMIS; ORDER GRANTING DEFEND ANT'S MOTION FOR TEMPORARY PHSYICAL AND LEGAL CUSTODY AND ORDER DENYING PLAINTIFF'S APPLICATION TO DECLINE

JURISDICTION; FAMILY COURT OF THE FIRST CIRCUIT; FCP 93 0625

ORIGINAL

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
DEC 11, 2000
At 10 o'clock and 33 min. a.m.
WALTER A. Y. H. CHINN, CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CATHERINE JANE VON KENNEL GAUDIN	)	CIVIL NO. 00-00765-SPK-LEK
Plaintiff,	)	
v.	)	
JOHN R. REMIS, JR.,	)	
Defendant.	)	

ORDER DENYING PETITION FOR RETURN OF CHILDREN TO PETITIONER PURSUANT TO 40 U.S.C § 11601 ET SEQ.

INTRODUCTION

Petitioner Catherine Jane Von Kennel Gaudin ("Petitioner") filed this action on November 22, 2000, pursuant to Hague Convention on the Civil Aspects

of International Child Abduction, implemented in the United States U.S.C. § 11601 et seq. The matter was heard on December 8, 2000, with Paul Lynch, Esq., representing Petitioner and Chunmay Chang, Esq., representing Respondent John R. Remis, Jr. ("Respondent"). The Court earlier denied ex parte requests by the Petitioner (1) to issue a Warrant in Lieu of a Writ of Habeas Corpus and (2) to Stay Family Court Proceedings pending in the Family Court of the First Circuit, State of Hawaii ("Family Court").

This Court has reviewed and examined the factual evidence submitted by both parties. Because the record is lengthy, because time is of the essence, and because the parties know the facts of the background, the Court will not repeat those details here except necessary to explain its ruling. For the reasons set forth to follow, the Court DENIES the Petition. Proceedings to determine custody may continue in the Family Court.

DISCUSSION

The Petition is brought under the Hague Convention and its implementing legislation, the International Child Abduction Remedies Act, 42 U.S.C. § § 11601-11610 ("ICARA"). Under ICARA, a petitioned court has authority to determine the merits of an abduction claim, but not the merits underlying custody dispute. See Shalit v. Coppe, 182 F.3d 1124, 1128 (9th Cir. 1999). "The court is to determine only whether a removal or retention was 'wrongful' under the law of the child's 'habitual residence, and if so, to order the return of the child...for the court there to decide the merits of the

custody dispute, unless the alleged abductor can establish one of a few defenses." Id. A court presented with an ICARA petition is not to determine custody.

"The wrongful taking of a child from his or her country of habitual residence normally requires the child's return." Whallon v. Lynn, 230 F.3d 450, 459 (1st Cir. 2000) (citing Hague Convention, art. 12, 19. I.L.M. at 1502). "Courts, however, are 'not bound to order the return of the child if the person... [who] opposes its return establishes that... there is a "grave risk" exception is narrow and must be proven by clear and convincing evidence. See id.

I.

Thus, the first question is whether the retention was "wrongful" under the law of the State that was the children's "habitual residence" See Shalit, 182 F.3d at 1128. The Petitioner must show this by a preponderance of the evidence. See 42 U.S.C. § 11603 (e) (1).

A Canadian trial court has already determined this. The children's "habitual residence" was Canada. Petitioner's affidavit and other evidence clearly establish that the children lived for several years with their mother in Canada, except for scheduled visits with their father during weekend, summer, and holiday periods. Respondent does not dispute that the children's habitual residence was Canada. This Court thus agrees (as it must) with the Canadian court's determinations that, for purposes of the Hague convention, Respondent's retention of his children after August 5, 2000, was "wrongful" in that (1) the "habitual residence" prior to that date was Canada, and (2) the retention by Respondent after

August 5, 2000, was not part of the July 27, 1994, Family Court judgments which were recognized in Canada on August 22, 2000. Petitioner exercised a lawful right of custody for purposes of ICARA and the Convention. See 42 U.S.C. § 11603 (e) (1).

Even so, however, the more relevant question is whether Respondent can establish any of the defenses. In particular, Respondent relies primarily on the "grave risk" exception under Article 13 (b) of the Hague Convention and 42 U.S.C. § 11603 (e) (2) (A).

II.

Article 13 (b) of the Hague Convention provides in pertinent part as follows:

> Notwithstanding the provisions of the proceeding Article [regarding return of a child wrongfully retained], the judicial or administrative authority of the requested State [Hawaii] is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> ...
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and had attained an age and degree of maturity at which it is appropriate to take account of its views.

Respondent asserts all defenses under Article 13 (b), although most attention is focused on the "grave risk" exception. Notably, a Hawaii Family Court judge has already determined, at least for purposes of changing temporarily its prior custody judgments from July 21, 1994, that there is a "grave risk" of psychological harm if the children are returned to their mother. Further proceedings are set in Family Court for December 12-13, 2000, to determine whether that temporary custody should become permanent. It is unclear whether the Family Court found "grave risk" by clear and convincing evidence. (Presumably in making its custody determination, the Family Court will also revisit or finalize whether there is a "grave risk" of harm to the children if they are returned to their mother in Canada.) Specifically, the Family Court found:

> 1) It is clear that both Hawaii and the Province of Quebec have jurisdiction in this matter and that there are substantial contacts in both jurisdictions with regard to the issues before the Court.
>
> 2) The parties by early agreement designated Canada as the venue for a hearing of any dispute between them on the issues before the Court. However, this Court finds that such an agreement between parties cannot confer jurisdiction when such an agreement operates against the best interest of the children.
>
> 3) This Court finds that it is not in the best interest of the children to return them to their mother at this time. The Court further finds

> that a grave risk exists that the children will be psychologically harmed if they were returned to their mother. This Court especially believes this risk exist as to the content of the proposed home-schooling of the children, and more significantly, based upon the report of Dr. Susan A. Lehrke, that the childrens' mental health is under severe stress and the children are both extremely angry at their mother.

Order Granting Defendant's Motion for Temporary Physical and Legal Custody and Order Denying Plaintiff's Application to Decline Jurisdiction, Gaudin v. Remis, FC-P 93-0625 (Family Court of the First Circuit, State of Hawaii, Sept. 25, 2000). This order was entered after two hearings in Family Court, wherein Petitioner was represented by legal counsel and where evidence was submitted.

Petitioner contends that Canadian authorities should make the custody determination. She effectively contends that the Hawaii Family Court does not have jurisdiction (both under the Hague Convention and under a " forum selection clause" in the July 24, 1994 judgments) to resolve custody disputes. See, e.g., Shalit, 182 F/3d at 1128. This argument was made, and apparently was rejected, by the Family Court when it denied a motion to decline jurisdiction and found grave risk. [1]

[1] Much is made of the "forum selection clause" in the July 27, 1994 judgments. It reads:

> . . . on all matters concerning this Judgment, any decision would be subject to the determination of a court of

(...continued)

However, the Hague Convention and ICARA clearly contemplate determinations of "grave risk" being made in the "abducted to" or "haven" state. See, e.g., Blodin v. Dubois, 189 F.3d 240 (2d Cir. 1999); Walsh v. Walsh, 221 F 3d 204 (1st Cir. 2000); England v. England, 2000 WL 1745127 (5th Cir. Nov. 27, 2000); Steffen F. v. Severina P., 966 F. Supp. 922 (D. Ariz. 1997). Although the case law indicates that the exceptions are narrow and the standards high, any reading of the Convention and ICARRA that either (1) prevents section 13 (b) proceedings in the haven state or (2) prevents "grave risk" findings on the basis of only serious psychological harm, would read the exception out of the convention. Such determinations of "grave risk" are distinct from (although they may be similar to) determinations of custody. Hawaii's courts are certainly competent to make such determinations.

Moreover, while it is true that one policy of the Hague Convention is to deter parents from crossing international boundaries in search of more sympathetic courts, and that normally courts in the "habitual residence" are to make custody determinations, these factors are tempered in this particular case by the fact that the original custody

[1] (...continued)
a court competent jurisdiction in the country in which the Mother and the Child are residing, taking into consideration the best interest of the Child.

The Canadian court interpreted this language as giving its courts jurisdiction over the matter. The Hawaii Court determined that there is concurrent jurisdiction and that the best interest of the children overrides an interpretation granting exclusive Canadian jurisdiction.

judgments are Hawaii judgments that were only recently judicially recognized and acknowledged in Canada. That is, the Canadian court adopted the Hawaii judgments (Hawaii Family Court case number FC-P 93-0925) in making its determination that the retention was wrongful under the Hague Convention. The children were originally from Hawaii and the underlying judgments remain Hawaii Family Court judgments. In an order of July 27, 2000, and again in the September 25, 2000, Order quoted above, the family above, the Family Court modified its previous judgments (i.e., the judgments underlying the judgment adopted in Canada) and granted temporary custody to Respondent, pending a trial scheduled to begin tomorrow. Normally, the Family Court – or any court – has jurisdiction to decide whether to change or to modify its own judgments based upon relevant changes in facts or circumstances.

III.

This case thus has an unusual procedural posture. It presents difficult problems for this Court in fulfilling its duties both (1) under ICARA and the Hague Convention, as well as (2) under the full faith and credit clause of the United States Constitution. The posture is unusual because other courts of competent jurisdiction have already issued rulings on issues relevant to, or identical with, matters now before this Court. This Court cannot ignore those decisions.

A Canadian court has determined that the "habitual residence" of the children is, or was, Canada and that retention was "wrongful" within the

meaning of the Hague Convention. The Hawaii Family Court has determined that – at least for purposes of temporarily modifying its previous July 27, 1994. Judgments so as to award custody of the children to Respondent – there is a "grave risk" that the children will be psychologically harmed if they were returned to their mother.

While ICARA requires custody to be determined by a court in the state of "habitual residence,: this is not so if a court has found "grave risk" by clear and convincing evidence. See Shalit, 182 F.3d at 1128 ("... Unless the alleged abductor can establish one of few defenses"). One commentator has observed:

> When [grave risk] is found under Art. 13, the court is required to exercise its discretion and, under the totality of the circumstances, decide where the decision on the best interests of the child is to be mad: The forum chosen by the abductor or the 'habitual residence' of the child[.]

William M. Hilton, The Limitations on Art. 13(b) of the Convention on the Civil Aspects of International Child Abduction, 11 Am. J. Famil. L. 139 (1997).

Under ICARA and the United States Constitution, this Court must give both of those orders (the Canadian and Hawaii Family Court orders) full faith and credit. See 42 U.S.C. § 11603 (g) ; U.S. Const., art. IV, § 1; 28 U.S.C. § 1738. If those decisions are wrong – and neither appears facially to be clearly erroneous or contrary to law – the appellate systems of Canada and the Hawaii courts

are available. See Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

It is also true that the Hague Convention contains a provision regarding decisions in "requesting States" relating to custody. Article 17 provides:

> The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention. (Emphasis added.)

Giving credit to both the Canadian and Family Court rulings, this Court finds that as the matter currently stands, (1) Petitioner has established as a threshold matter that retention of the children by Respondent was "wrongful" for purposes of ICARA and the Hague Convention, but (2) a "grave risk" of psychological harm has been at least provisionally established by the Family Court in its September 25, 2000, order. If the Hawaii Family Court reviewed and credited the same evidence that has been submitted as exhibits in the instant proceeding, then this Court would agree that "grave risk" would have been established by clear and convincing evidence. However, because it is unclear which burden of proof (e.g., a mere preponderance of the evidence or a higher clear and convincing burden) was applied by the Family Court, this Court will proceed with its own inquiry into "grave risk."

In this regard, the Court has reviewed all the exhibits submitted by both parties and by the Custody Guardian Ad Litem. During the oral hearing, the Petitioner agreed with the suggestion that, if this Court were so inclined, a "grave risk" determination could be made on the basis of the written submissions. Respondent, although indicating a preference for an evidentiary hearing so as to present additional evidence, also agreed that a decision could be made on the current record now before the Court.

Having reviewed and analyzed the evidence in detail, the Court finds that Respondent has met his burden of demonstrating by clear and convincing evidence that the children would be subject to a grave risk of psychological harm if they were returned to their mother at this time. This finding is based on evidence that at least some harm was occurring or had occurred before the children returned to Hawaii. In particular, the Court credits (1) the November 20, 2000, Report of the Custody Guardian Ad Litem, Marianita Lopez, Esq., (2) the August 30, 2000, affidavit of Dr. Sue A. Lehrke, (3) Dr. Lehrke's letter of November 17, 2000, (4) the August 30, 2000, Declaration of John R. Remis, Jr., in Opposition to Motion to Decline Jurisdiction and Related Matters, originally filed in the Family Court, (5) the July 26, 2000, Declaration of John R. Remis, Jr., made in support of his application for temporary restraining order and temporary change of custody, originally filed in the Family Court, and (6) a videotape of interviews of the children conducted by a social worker in the State of Hawaii Department of Human Services, Children's Advocacy Center (submitted by the Guardian Ad Litem). The Court

has also taken into account the findings and reasons stated in the September 25, 2000, order of the Family Court modifying its July 27, 1994, judgments (the order granting temporary custody to Respondent and finding grave risk to the children if they are returned to Petitioner).

The Court understands that a finding of grave risk does not mandate keeping the children in Hawaii. The decision is discretionary with this Court. The Court has considered other alternatives or undertakings such as requiring the children to return to Canada in the custody of their father or in the custody of a pastor acquainted with the Petitioner. Importantly, however, proceedings have been ongoing in the Family Court since July of 2000 (when Respondent clearly had proper custody under the July 27, 1994, Family Court judgments). That court supervised process has already consisted of evaluations and reports by psychologists, doctors, social workers, lawyers, police officers, and jurists. Those contested proceedings are nearing completion as hearings in Family Court are set to begin tomorrow.[2] Exercising its discretion, and considering the totality of circumstances, this Court finds that the Hawaii Family Court custody judgments should be modified permanently or otherwise.

CONCLUSION

Accordingly, the Petition for Return of

[2] ICARA also provides that subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

Children Pursuant to the Hague Convention is DENIED. The children need not be returned to Canada or to their mother at this time. They are presently in lawful custody of their father. Custody of the children shall remain with Respondent in accordance with the Hawaii Family Court order of September 25, 2000, until such time as a different custody determination is made by a court of competent jurisdiction. The Court thus refuses to stay any scheduled proceedings in the Hawaii Family Court. The parties shall bear their own fees and costs.

IT IS SO ORDERED.
Dated: Honolulu, Hawaii,
DECEMBER 11, 2000

/s/ _____
SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
DECEMBER 07, 2001
at 4 o'clock and 30 min. pm
WALTER A.Y. H. CHINN, CLERK

LYNCH ICHIDA THOMPSON & KIM
A Law Corporation

PAULA L. LYNCH 661-0
1132 Bishop Street, Suite 1405
Honolulu, Hawaii 96813
Telephone: 528-0100

Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

In re the Application of:	) Civil No.
CATHERINE JANE	) 00-00765 SPK LEK
VON KENNEL	) Other Statutory Actions
GAUDIN,	)
	) NOTICE OF HEARING
Petitioner,	) PETITIONER'S MOTION
	) TO VACATE ORDER
vs.	) DATED DECEMBER 11,
	) 2000; MEMORANDUM IN
JOHN R. REMIS, JR.,	) SUPPORT OF MOTION;
	) EXHIBITS "C-3" TO "C-9"
Respondent.	) AND "P"; CERTIFICATE
	) OF SERVICE
	)
	) Hearing Date: February

) 22, 2002
) Hearing Time: 10:00 a.m.
) Judge: Honorable Samuel
) P. King

NOTICE OF HEARING OF PETITIONER'S
MOTION
TO VACATE ORDER DATED DECEMBER 11, 2000

TO: Chunmay Chang, Esq. 547
Halekauwila Street, #216
Honolulu, Hawaii 96813
Attorney for Respondent

NOTICE IS HERBY GIVEN that the above-identified Petitioner's Motion to Vacate Order dated December 11, 2000 shall come on for hearing before the Honorable Samuel P. King, Judge of the above-entitled Court, in his courtroom in the United States Courthouse, 300 States Courthouse, 300 Ala Moana Boulevard, Honolulu, Hawaii on Friday, the 22nd day of February, 2002, at 10:00 o'clock, a.m. or as soon thereafter as counsel may be heard.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

In re the Application of:	) Civil No.
CATHERINE JANE VON KENNEL GAUDIN.	) 00-00765 SPK LEK) Other Statutory Actions)
Petitioner,	) PETITIONER'S MOTION) TO VACATE ORDER) DATED DECEMBER 11
vs.	) 2000)
JOHN R. REMIS, JR.,	))
Respondent.	)

PETITIONER'S MOTION TO VACATE ORDER DATED DECEMBER 11, 2000

Comes now Petitioner above named by and through her attorney, Lynch Ichida Thompson & Kim, and moves this Honorable Court for an order vacating the Court's earlier order dated December 11, 2000.

This motion is based on Rules 7 and 60(b))(1), (2), and (3) of the Federal Rules of Civil Procedure; specifically that newly discovered evidence and fraud, misrepresentation or misconduct of an adverse party, all discovered subsequent to the time in which to move for a new trial under Rule59(b) had expired, mandates that vacation of the order dated December 11, 2000 is proper and appropriate in the circumstances, This motion is based upon the record

in this matter, the memorandum in support of this motion, the exhibits attached hereto, and certain transcripts from the State of Hawaii proceedings.

LYNCH ICHIDA THOMPSON & KIM A
Law Corporation

PAULA. LYNCH
661 0 1132 Bishop Street, Suite 1405
Honolulu, Hawaii 96813
Telephone: 528-0100

Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CATHERINE JANE VON KENNEL GAUDIN	CIVIL No. 00 00765 SPK
Petitioner,	
JOHN R. REMIS, JR	MOTION UNDER RULE 60 (B) TO VACATE DATED DECEMBER 11,2000
Respondent	

MOTION UNDER RULE 60 (B) TO VACATE

ORDER DATED DECEMBER 11, 2000

TABLE OF CONTENTS

I. Introduction.....P.10

A) Application of the Hague Convention.....P.10

B) Wrongful removal or retention.....P.10

C) Grave Risk.....P.11

D) The decision relating to custody in the Family Court shall not be a grounds for refusing to return a child under the Hague Convention.....P.11

E) The non return of the children to Canada under the Hague Convention would be an endorsement of the defendant's breach of the following laws and Principles.....P.12

II. Newly-discovered evidence and misrepresentations.....P.13

A) Newly discovered evidence and misrepresentations concerning:.....P.15

i) The August 30, 2000, Declaration of John R. Remis, Jr., in Opposition to Motion to Decline Jurisdiction and Related Matters;

ii) The July 26, 2000 Declaration of John R. Remis, Jr., made in support of his application for temporary restraining order and temporary change of custody, originally filed in the Family Court;

iii) The videotape interviews of the children conducted

by a social worker in the State of Hawaii Department of Human Sevices, Children's Advocacy Center (submitted by the Guardian Ad Litem);

iv) The August 30, 2000, affidavit of Dr. Sue A. Lehrke and Dr. Lehrke's Letter of November 17, 2000;

v) The November 20, 2000, Report of the Custody Guardian Ad Litem, Marianata Lopez, Esq.,.

DThe newly discovered evidence in Family Court showed that the allegation of defendant in those Declaration was not accurate and was misleading. It also explains the reasons for the children's behavior at the videotape interview.....P. 15

1) Dr. Lehrke describes the parental lienation syndrome, as follows:.....P. 18

2) Dr. Lehrke, when she interviewed the children, made no investigation that the defendant had said negative things about his children's Mother..... P 19

3) Dr. Lehrke had a concern about whether the children were being significantly alienated from their Mother.....P. 20

4) Defendant never encourages or prepares the children for their return to their Mother after visitation.....P. 21

5) Defendant never agreed with the religious belief and practice of the Plaintiff

and did inform the children about his disagreement.....P. 21

6) The Defendant in a conflicting situation with Plaintiff did not support his children communicating with their Mother.....P.23

7) The Defendant, in the presence of the children, conveys negative attitude about their Mother.....P.23

8) Troubling statements are made by the children while being interviewed by the C.P.S., that show signs of influence from an adult leading to parental alienation ....P. 26

9) Dr. Lerhke would not give any opinion about custody and visitation, even after reading the Custody Guardian Ad Litem report.....P.27

10) The Defendant admitted that he would have returned the children to Plaintiff if she had renounced the home schooling of the children.....P.29

11) Plaintiff is a good mother acting in the best interest of the children and the Defendant decided unilaterally to alienate the children from her.....P.31

12) Since 1994 plaintiff has always encouraged the relationship of the

childrenwith the Defendant.....P.34

13) The Plaintiff invites the defendant into her house before his departure with the children.....P.35

14) The Plaintiff consents to the summer activities choices of the defendant for the children and never interferes.....P.35

15) Since 1998 the Plaintiff has even consented to help the Defendant do some activities (Halloween) with the children some of which she doesn't approve.....P.36

16) The Plaintiff respected and never interfered in the way Defendant was exercising his visiting rights.....P.37

17) The Plaintiff yielded to the Defendant's requirement for her relocation, even though it was distant from her family, but closer to the Defendant's family.....P.37

18) The Plaintiff encourages communication between the children and the Defendant and respects their schedule.....P.38

19) The Plaintiff keeps the Defendant informed of any subject regarding the children as required by the 1994 stipulated judgment.....P.38

i)For the children's education she communicated the school reports and

consulted the Defendant for his opinion on home schooling by sending the following letter:.....P.38

ii) For Johnny's shortness of breath and chest pains she informed the Defendant and went to see a Doctor.....P.40

20)The Plaintiff sees to it that the children remember their Father's birthdays.....P.42

21)Defendant has had physical custody of the children for the Last 7 months resulting in parental alienation from their Mother.....P.44

22)The Plaintiff is very flexible, which is a appropriate quality for the custodial parent, as shown by the following events.....P.45

2) This Court was misled by the evidence produced as exhibits by the Defendant in the Federal Court proceeding..... P.45

a) The July 26, 2000 Defendant's declaration supporting the ex parte motion.....P.45

b) The August 30, 2000, affidavit of Dr. Sue A. Lehrke and Dr. Lehrke's letter of November 17, 2000.....P.51

3) This Court was not informed that Dr. Lehrke's Letters and Affidavit, were in fact and in law incompetent under the mandatory requirements

of the American Psychological Association Ethics Code.....P.57

a) Dr. Lehrke's Letters, Affidavit, and testimony are incompetent and irrelevant and should not be given any weight by this Court.....P.57

i) Dr. Lehrke performed forensic functions for John Remis in this case and did so in direct violation of the mandatory rules of ethics for psychologists in such case, and then deliberately mislead the Court under oath.....P.57

4) The Defendant never disclosed to this Court that his objective was to petition the Hawaii Family Court only for a more convenient forum for himself and for his solely personal and economic concerns.....P.69

I

i) The Defendant engaged in an abuse of process in order to obtain a more convenient forum.....P.72

ii) Complication of procedures for the Plaintiff because of the Defendant's action.....P.76

5)The November 20, 2000, Report of the Custody Guardian Ad Litem, Marinita Lopez, Esq.,.....P.78

a) The Custody Guardian Ad Litem report should not be considered by this Court as evidence to determine the "grave risk" issue for the following reasons.....P.78

i)The Custody Guardian Ad Litem is an attorney for the children and is bound by the Hawaii rules of professional conduct.....P.78

ii) In this case the Custody Guardian Ad Litem is an attorney to a child in a custody case.....P.80

iii) The Custody Guardian Ad Litem has based her recommendation on Dr. Lehrke's report which Dr. Lehrke admits cannot be relied upon.....P.81

iv) The Custody Guardian Ad Litem has no psychological expertise, nor did she obtain consultation from an expert other than Dr. Lerhke for her report and testimony.....P.82

v) The only other evidence that the Custody Guardian Ad Litem could rely on is the version of her clients (the children) and the Defendant, which is not sufficient evidence because both may have a biased position against Plaintiff and in any event there is no valid psychological expertise to evaluate this family and the truth.....P.83

vi) The report of the Custody Guardian Ad Litem is biased, incomplete, contains hearsay and relies on no valid expertise of any kind at all.....P.84

III. Conclusion.....P.87

A) The non return of the children to Canada under the Hague Convention would be an endorsement of the Defendant's breach of the following laws and principles.....P.87

1.) The Hague Convention article 3 (Exhibit A); 2.) The Canadian court decision on August 22, 2000 (Exhibit C-1); 3.) The Canadian court decision on November 23, 2000 (Exhibit C-2); 4.) The finding of Judge King's decision on the following matter;

5.)The International Child Abduction Remedies Act (ICARA) 42 USC 11601 sec 2 A (2) (Exhibit B);

6.) The Hawaii 1994 stipulated judgment;

7.) The abuse of process of the family court rules on special proceedings. (*ex parte* motion); and

8.) The jurisprudential outline by the United States court of appeals for the sixth circuit in its decisions re: Friedrich vs Friedrich, which is the leading case on the Hague Convention in the United States that includes the following principles.

I. INTRODUCTION

A) Application of the Hague convention

The Hague Convention (Exhibit A) is an international

law that provides in its preamble that:

> "the states signatory to the present convention are firmly convinced that the interests of children are of paramount importance in matters relating to their custody, desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access, have resolved to conclude a convention to this effect, and have agreed upon the following provisions..." (Emphasis added).

The International Child Abduction Remedies Act (Exhibit B) 42 USC 11601 et seq. (ICARA) implements the Hague Convention in the United States of America.

B) Wrongful Removal or Retention:

On November 23, 2000 the Canadian Court, after considering all the evidence filed in the Hawaii Court, rendered a judgment acknowledging that the children have been the object of an international abduction (wrongful removal or retention) according to articles 3 and 5 of the Hague Convention (Exhibit C-2). This Court came to the conclusion that "Petitioner has established as a threshold matter that retention of the children by respondent was 'wrongful' for purposes of ICARA and the Hague Convention." (Order p.1-1)

C) Grave Risk

Under the criteria of the Hague convention whether

there is a grave risk must first be determined because if there is not a grave risk the issue of custody must be decided in Canada.

The burden of proof of the existence of grave risk (clear and convincing evidence) is much greater than the preponderance of evidence.

We submit that in light of the newly discovered evidence heard and produced in Family Court that the burden of proof for "grave risk" has not been met and therefore "grave risk" does not exist in this case.

D) The decision relating to custody in the Family Court shall not be a grounds for refusing to return a child under the Hague Convention.

Article 17 of the Hague Convention provides:

> "The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a grounds for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention. (Art. 17 Exhibit A) (Emphasis added).

E) The non-return of the children to Canada under the Hague Convention would be an endorsement of the Defendant's breach of the following laws and principles:

1.) The Hague Convention article 3 (Exhibit A).

> "The removal or the retention of a child is to be considered wrongful where
>
> > a) it is in breach of right of custody attributed to a person...."(Emphasis added).

2.) The Canadian court decision on August 22, 2000 (Exhibit C-1). 3.) The Canadian court decision on November 23, 2000 (Exhibit C-2):

> "We acknowledge that the child, Andreas Wailani Remis, born on June 23, 1992 and the child John Anolani Remis, born on September 17, 1990 have been the object of an international abduction (wrongful removal or retention)... according to the article 3 and 5 of the Hague Convention on the civil aspects of international child abduction." (Emphasis added).

4.) The finding of Judge King's decision on the following matter:

> "Petitioner has established as a threshold matter that retention of the children by Respondent was "wrongful" for purposes of ICARA and the Hague Convention" (Order p.1-1) (Emphasis added). d)

Concerning "grave risk":

> "...we believe that a grave risk of harm for the purpose of the convention can exist in only two

> situations. First, there is a grave risk of harm when return of the child puts the child in immminent danger prior to the resolution of the custody dispute e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection." (p 7 Exhibit P)(Emphasis added).

On December 11, 2000 this Court denied the petition for return of children to petitioner pursuant to 42 U.S.C 11601 ET SEQ (the International Child Abduction Remedies Act). The trial in State Family Court began the next day December 12, 2000. During this trial petitioner discovered new evidence that mandates a change in the decision of this Court on the petition for the return of her children.

II. NEWLY-DISCOVERED EVIDENCE AND MISREPRESENTATIONS

In the December 11, 2000 order, this Court stated

> "...respondent has met his burden of demonstrating by clear and convincing evidence that the children would be subject to a grave risk of psychological harm if they were returned to their mother at this time. This finding is based on evidence that at least some harm was occurring or had occurred before the children returned to Hawaii (sic). In particular, the Court credits (1) the November 20, 2000,

> Report of the Custody Guardian Ad Litem, Marianita Lopez, Esq., (2) the August 30, 2000, affidavit of Dr. Sue A. Lehrke, (3) Dr. Lehrke's letter of November 17, 2000, (4) the August 30, 2000, Declaration of John R Remis, Jr., in Opposition to Motion to Decline Jurisdiction and Related Matters, originally filed in the Family Court, (5) the July 26, 2000, Declaration of John R. Remis, Jr., made in support of his application for temporary restraining order and temporary change of custody, originally filed in the family Court, and (6) a videotape of interviews of the children conducted by a social worker in the State of Hawaii Departement of Human Services, Children Advocacy Center (submitted by the Guardian Ad Litem). The Court has also taken into account the findings and reasons stated in the September 25, 2000, order of the Family Court modifying its July 27, 1994, judgments (the order granting temporary custody to Respondent and finding grave risk to the children if they are returned to Petitioner)." (p. 12, Order denying petition for return of the children to petitioner, December 11, 200) (Emphasis added).

As we will demonstrate in the following arguments, the Family Court trial held in this case has revealed new evidence that directly contradicts what was disclosed to this Court when the petition for return of child pursuant to 42 U.S.C 11601 ET SEQ (the International Child Abduction Remedies Act) was heard on December 8, 2000. This evidence also shows that some of the documentary evidence produced

before this Court was misleading and inaccurate.

A) Newly discovered evidence and misrepresentations concerning:

i) The August 30, 2000, Declaration of John R Remus, jr., in Opposition to Motion to Decline Jurisdiction and Related Matters;

ii) The July 26, 2000 Declaration of John R. Remus, jr., made in support of his application for temporary restraining order and temporary change of custody, originally filed in the Family Court;

iii) The videotape of interviews of the children conducted by a social worker in the State of Hawaii Department of Human Sevices, Children's Advocacy Center (submitted by the Guardian Ad Litem).

iv) The August 30, 2000, affidavit of Dr. Sue A Lehrke and Dr. Lehrke's Letter of November 17,2000.v) The November 20, 2000, Report of the Custody Guardian Ad Litem, Marianata Lopez, Esq .,

1) The newly discovered evidence in Family Court showed that the allegations of defendant in those Declaration were not accurate and were misleading, it also explains the reasons for the children's behavior at the videotape interview.

The Defendant alleges that there is a grave risk, but the facts show otherwise.

The Defendant uses the differences in parenting the children between himself and the Plaintiff as grounds for asserting a "grave risk". The difference in parenting is a healthy situation for children who can compare and benefit from two different parents in character, behaviour and parenting skill. The only negative effect is that the Defendant, instead of confirming the parental authority of the Plaintiff (Mother) over the children, did in fact get involved in discrediting Plaintiffs (Mother's) behavior and parenting skills on many occasions in front of the children. That attitude has been going on for at least the past two years, as demonstrated by Defendant's first visit to Dr.Lehrke's office in the summer of 1999.

The purpose of the first visit to Dr. Lehrke came about because of the following alleged report of the children to the Defendant:

Unhappiness, stuttering, Bible work, the way their Mother was treating them, the soup, absence of socialization, no sports, doing nothing outside of the house and they did not want to go back with the Mother

> "Q. What was your purpose in going there in 1999?" (p.25, line 12, Remis Transcript, December 14, 2000)
>
> "The Witness: the guys were unhappy. Johnny had been stuttering. They had been complaining about the Bible work. They were complaining about the way their mother treated them and they... complained about something about the soup, that she couldn't...

> ...something about... ...they didn't like some kinda soup and had to eat it again.
>
> They basically didn't wanna go back. They didn't ...they have always expressed that they don't wanna go back and not just at the end of the summer. It goes throughout the summer that they don't wanna go home.
>
> And so I was concerned about their absence of socialization because the all... the other issue that was... ...was that Catherine was no longer doing anything with them in terms of sports... ...that Catherine was no longer doing anything with them outside of the house, (p.25, lines 18 to 25 and p.26, lines 1 to 7, Remis Transcript, December 14, 2000) (Emphasis added).

The opinion of Dr. Lehrke at that time was that the children were healthily rejecting whatever the circumstances were:

> "A. Because the psychologist told me that there was no reason for concern, that the boys were healthily rejecting whatever the circumstances were." (p.67, lines 15 to 17, Remis Transcript, December 13, 2000) (Emphasis added).

The Defendant instead of supporting the Mother in front of the children, openly showed to the children that he did not agree with their Mother's behavior and parenting skills. This initiated the process of the children's alienation from their Mother by Defendant.

Defendant on many occasions influenced the children

by his words and behavior in order to show them (consciously or not) that he disapproved of their Mother's behavior and parenting skills.

We will try to describe through statements of the Defendant what we feel is only the tip of the iceberg of the parental alienation here, because it is the only evidence available in that no professional family expertise has been utilized to assess and evaluate this family. (Defendant objected to the Plaintiffs proposal at the beginning of the Family Court trial to have a psychological family evaluation by an independent psychologist)

i) Dr. Lehrke describes the parental alienation syndrome, as follows:

> " -- But -- but the concept is that some parents either overtly create a poise (sic poisonous ?) of attitude in children toward their other parent, and some parents, through more subtle means, like body language and facial expression and tone of voice, um, convey negative attitudes towards the other parent to the child and essentially alienate the child from the other parent.
>
> And then parental alienation syndrome is applied when the child seems to have completely rejected the other parent, um, because of the parent's -- one parent's alienating activities." (p. 20, lines 15 to 25, Lehrke Transcript, December 19, 2000)
>
> "A. Um, well, the other -- one other thing that

is sometimes considered a sign of that is if the children can express no positive feelings towards a parent

And that actually is present in this case; "
(p 21, lines 10 to 13, Lehrke Transcript, December 19, 2000). (Emphasis added)

" But I do - I have clinically experienced that some parents seem to actually very actively poison their children's minds against the other parent" (p 73 lines 1 to 3 Lehrke Transcript, December 19, 2000) (Emphasis added)

2)Dr. Lehrke, when she interviewed the children, made no investigation to determine if the defendant had said negative things about his children's Mother:

"Q Do you have a sense whether when he said that to you that that was in any way influenced by Mr. Remis?

A That's a possibility that I raised with the custody guardian ad litem because Mr. Remis is an attorney and he's familiar with family court issues. And so I talked to her about the possibility that he had coached the children or encouraged them to do so some sort of an acting job when they were seen by me

But I didn't have any evidence that the children were parroting rehearsed statements and I didn't have any evidence that he had said negative things about their mother or

encouraged them to have negative attitudes towards her." (p. 18 lines 7 to 18, Lehrke Transcript, December 19, 2000). (Emphasis added).

"... What I was looking for was whether there was anything I could find out from the boys that would indicate that father was creating the alienating feelings that they were having towards their mother.

Q. And at this point, are you in a position to tell the Court whether you found anything on Mr. Remis'part to cause this alienation from the mother?"

A. I didn't find anything, but that's not conclusive because really I did not do an investigation." (p 23 lines 4 to 12, Lehrkes Transcript, December 19, 2000). (Emphasis added).

3)Dr. Lehrke had a concern about whether the children were being significantly alienated from their Mother:

" A. Um, well, the other -- one other thing that is sometimes considered a sign of that is if the children can express no positive feelings towards a parent.

And that actually is present in this case, in -- John, Jr. he -- he -- when I press him, he can't give me any negative (sic) perceptions of his mother.

Andreas can say maybe she's okay in some ways, although he couldn't come up with anything much specific either.

So that is a concern about whether the children are being significantly alienated from their mother." (p.21, lines 19 to 20, Lehrke Transcript, December 19, 2000) (Emphasis added).

4)Defendant never encourages or prepares the children for their return to their Mother after visitation:

"...The... of course the boys were in tears, and I think Catherine met us there and the separation was traumatic, as they always are..." (p. 13, lines 1 to 3, Remis Transcript, December 12, 2000) (Emphasis added).

5)Defendant never agreed with the religious belief and practice of the Plaintiff and did inform the children about his disagreement:

The Defendant's view of religion seems very negative when he states:

"...the human experience suggests that religion is the basis for unfortunate problems in the world, and there are many people who go overboard." (p.66, lines 23 to 25, Remis Transcript, December 13, 2000).(Emphasis added).

This translates to a difference between him and the

Plaintiff on the place and practice of religion in the life of an individual and the family including the lives of their children. The Defendant did attend the Plaintiffs Church once and stated:

> ".. .so I was there for the whole time, and it was oppressive to me. Not to the religion, but for the time..." (p. 70, lines 9 and 10, Remis Transcript, Dec 13, 2000). (Emphasis added).

The manner in which the Defendant expressed to his children his feelings about the Plaintiffs Church was in derogation of the Mother's religious practices: "Q. Okay and did you express to the boys that you were tired?

> A. Probably. I said,you know, let's get out of here." (pg. 71, lines 3 to 6 Remis Transcript, Dec 13, 2000) (Emphasis added).
>
> "Q. And you sympathized with them and you wanted to assist them to go home, right?
>
> A. No. I knew that we were there until Catherine was able to leave.
>
> Q. Okay.
>
> A. And...and...so
>
> Q. But you sympathized with them about you're tired so you can understand how they're tired, and...
>
> A. Sympathized with them because they were

tired and they...

Q. Right.

A.. ..were anxious to get outside and play.

Q. Right, and.. .and you let them know that you sympathized with their feelings.

A. Of course, (p.72, lines 1 to 15, Remis Transcript, December 13, 2000). (Emphasis added).

6) The Defendant, in a conflicting situation with Plaintiff did not support his children in communicating with their Mother ;

"... .and I told them, it's your Mother. You gotta be polite, but I'm not gonna tell you what to do..." (p.30, lines 11 and 12, Remis Transcript, December 13, 2000).

"Q. Okay and, you know, a little bit earlier here this morning you testified that in their phone calls to their Mother you told them that they needed to be polite but you weren't gonna tell them what to say or do. Is that correct?

A. Yeah, I wasn't gonna order them to do something'." (p.72, line 16 to 21, Remis Transcript December 13, 2000) (Emphasis added).

7) The Defendant, in the presence of the children, conveys negative attitudes about their Mother:

> Q. Since you've had the boys from June 9[1] , how have they maintained contact with Miss Gaudin, their Mother?
>
> A. Yes, Basically, the arrangement has always been that we would make the phone calls to their Mother, and we did that. And then with all that has been thrown at us, if you will, I said, you know what, let her call us..." (p.29, lines 10 to 16, Remis Transcript December 13, 2000). (Emphasis added).

Defendant, when he called Plaintiff for the immunization records required by the school in Hawai'i, chose to do so in the presence of the children, which demonstrates how much he has them involved in the proceedings:

> "A. I called before the guys.. .what, August 23rd was their first school day at Pauoa Elementary. I had made the request for this information ..Well.. .probably two weeks in advance of that. I went to the school and picked up the enrollment package and whatever it was, and this was part of it, and so I said I need this stuff. And it was a dead end." (p 44, lines 7 to 14, Remis Transcript, December 13, 2000) (Emphasis added).

The same as to the visit of the police officers, which should not have been any concern of the children, but the Defendant chose to inform them of the purpose of the visit:

> "...and I told them, there's an investigation and

everything was okay...." (p.22, lines 8 and 9, Remis Transcript, December 13, 2000).

"Q. Has it become aware to you that the boys have made the connection that they thought it was their Mother?

A. They asked her why she called the police on them. Why are you callin' the cops on us or why are you callin' the police on us" (p. 133, lines 9 to 13, Remis Transcript December 13, 2000, 9 to 13). (Emphasis added).

This led to the children confronting their Mother with that issue on the telephone:

" A. They - um - - they told me that they knew that their mother had something to do with this because one of them had confronted her about it on the phone and she had admitted it." (p.51,lines 9 to 12, Lehrke Transcript, December 19, 2000). (Emphasis added).

And Defendant made derogatory comments after the intervention of the C.P.S.:

"And I said, Well, you know, whatever this is, that you just have to.. .we just have to participate in this. This is what happens when cases like this go on.(p.23, lines 5 to 7, Remis Transcript, December 13, 2000). (Emphasis added).

About those incidents (Police and C.P.S.) the Defendant told the children that allegations had been

made against him, which did cause the children to be very upset against their Mother:

> "Q. And that's three months later. And what was the occasion for seeing them on November 10th, given what you just testified to ?
>
> A. Um, Mr. Remis called because they were again quite upset and that because they had been interviewed related to allegations against him.
>
> Q. I'm sorry. Would you repeat the last part of that answer ?
>
> A. They were being interviewed related to allegations against Mr. Remis by their mother, and Mr.Remis felt that they were again very upset, kind of acutely upset, and so he felt they needed to be seen. (P. 48, lines 6 to 17, Lehrke Transcript, December 19, 2000) (Emphasis added).

8) **Troubling statements are made by the children while being interviewed by the C.P.S., that show signs of influence from an adult leading to parental alienation:**

- Andreas said regarding Kanani:

  "We don't see Kanani anymore because she is on Mother's side" (see videotape). (Emphasis added).

This expression comes obviously from the influence of

an adult.

- Andreas said regarding the Church of their Mother, which they have attended for the past six years:

"it's a weird Church" (see videotape) (Emphasis added). This expression comes obviously from an adult.

- Andreas when questioned about his Mother said:
"What do you like about Mom?

Nothing."(see videotape). (Emphasis added). This statement shows a typical symptom of parental alienation syndrome.

- Johnny said among other things when criticizing his mother's house:
" She doesn't have a fire alarm", (see videotape).

This observation does not likely come from a ten-year-old boy but from the influence of an adult.

9) Dr. Lehrke would not give any opinion about custody and visitation, even after reading the Custody Guardian Ad Litem report:

> Q. (BY MR. LYNCH) Doctor, this is a letter that you sent to Chun May Chang, Esquire, and myself, December 15th, which is I guess

last Friday, and you were telling us about your availability today to testify by telephone. And you state that you will not state expert opinions 'cause that's the role of the custody guardian ad litem.

And my question is, this is something that you indicated in your earlier testimony that you had told Mr. Remis all along; correct?

A. That's right.

Q. And is there any particular reason then why you're reiterating it in this letter?

A. I think I'm reiterating it to kind of, um, reiterate it to May Chang that - - that I intend to defer to the custody guardian ad litem regarding opinions about custody and visitation.

Q. Okay. Do you know if the custody guardian ad litem has psychological training?

A. No.

Q. But you felt that the custody guardian ad litem seems to have - - you've read her report, I take it?

A. I've read her first report. I don't know if there were any other reports.

Q. No, there are not, that - - that I'm aware of. The - - you feel that your testimony will —you

doubt that it'll shed new light because she seems to have obtained all the same information independently from the same sources.

Do you see that? A. Yes.

Q. Okay. And do I take it then, the bottom line for you when you wrote this letter is you don't understand really why anybody needs you to testify at all?

A. That's right, (p.44, lines 17 to 25; p. 45, lines 1 to 25, Lehrke Transcript, December 19,2000). (Emphasis added).

10) The Defendant admitted that he would have returned the children to Plaintiff if she had renounced the home schooling of the children;

" Q. Well, would you agree with me that what you were offering her was I've got a problem with your home schooling. If you'll give up the home schooling - - if you don't give up the home schooling, then I'm gonna attempt to get custody of the boys. If you give up the home schooling I won't.

Is that what it's - -

A. Yeah, that's - - that's the black and white." (p. 187 lines 18 to 25, Remis Transcript, December 13, 2000). (Emphasis added).

This statement puts the lie to the Defendant's purported concern that he be given custody because of his sons allegedly "much much much worse" condition observed when he picked them up on June 9, 2000.

The defendant's position on home schooling has been totally unjustified because of his total ignorance about it:

> " Q. Okay. Now do you have a problem with the content of the curriculum in the home school program?"
>
> A. I don't know its content (p. 121, lines 20 to 22, Remis Transcript, December 13,2000).
>
> " The Witness: I don't know anything about Bob Jones and I don't have an opinion about it as - - an appropriate forum for home schooling or format for home schooling. So I - - my objection is more generic." (p 122 lines 22 to 25 Remis Transcript, December 13, 2000). (Emphasis added).

Home schooling is a legally approved method of education in the province of Quebec, Canada, which is the habitual residence of the children for the past 6 years:

> Quebec Education Act, article 15 (4):
>
> " 15. The following students are exempt from compulsory school attendance:
>
> (4) a student who receives home

> schooling and benefits from an educational experience which, according to an evaluation made by or for the school board, are equivalent to what is provided at school."(Exhibit C-3 p.5) (Emphasis added).

11) Plaintiff is a good Mother acting in the best interest of the children and the Defendant decided unilaterally to alienate the children from her.

Children need a normal relationship with their parents. The best interest of the children requires a balance of healthy relations with both parents notwithstanding the differences that could exist in the parents' behavior, character or parenting when they are in the parents' presence either by custody or visitation.

In this case the children had a good balance with their two parents. Even if the parents are different in many ways, they still provided the children with everything necessary to meet their material physical and emotional needs.

The ability of the parents to cope with their differences in raising the children had been successful until the defendant decided unilaterally that the Plaintiff was not a good Mother anymore.

The Defendant had agreed in 1994 that the Plaintiff was a good Mother and that it was in the best interest of the children that she have custody while he had extended visiting rights:

"Whereas, the Defendant has consented to sole legal and physical custody of the

subject child being awarded to Catherine Jane Von Kennel Gaudin subject to

Defendant's right of reasonable visitation;..."

(Exhibit E-1 and E-2,1994 stipulated Judgment p.2 lines 1 to 4) (Emphasis

added).

The defendant stated in his testimony:

"A. Well, in 1994 I thought she was a good Mother." (P.51, line 19, Remis Transcript, December 14, 2000) (Emphasis added).

Both parents in this case love their children and even if the circumstances presently seem to show otherwise, the children deeply love their Father and their Mother.

As Exhibit C-9 shows, the two children were smiling and looking very happy when their picture was taken in their Mother's home before the summer of 2000.

According to the Plaintiff and to the testimony of Pastor Paul Pelletier (who knows the children personally), they were happy with their Mother. The next-door neighbor, Mr. Mackenzie, (at the children's demand) even changed, his schedule to cut a tree with them before they left for visitation with their Father in June 2000 and never noticed any unhappiness or

any change in behavior or energy.

How could this be?

Children are easily influenced by parents and also will act differently with each parent in order to keep their peace with them or to obtain from one parent what they know the other parent would not agree on.

When parents do not have a "support" with each other in their parenting of the children in order to maintain consistent decisions, the children, regardless upon which parent they make a demand, will find out easily that they can manipulate certain decisions of both parents.

In this case the "support" did exist "by tolerance" between the parents for years, but differences in opinion did culminate in a conflict when the idea of home schooling arose in the year 2000:

> "Q. If she had responded that she would change her attitudes towards home schooling and respond to your letter, what would that have indicated to you? as far as perhaps her method of parenting?
>
> A. It would have been a... a departure from her lack of cooperation and affording any opportunity at co-parenting and discussing important issues in our sons' lives.
>
> Q. And would you have continued further discussion with her as far as other aspects of her parenting with Andreas and Johnny?

A. Yes.

Q. Would it be fair to describe this home schooling issue as the straw that broke the camel's back?

A. Yes."(p.52, lines 20 to 25, p.53, lines 1 to 9, Remis Transcript December 14, 2000).

(Emphasis added)

The Defendant's decision to ask for change of custody by way of an *exparte* motion in Hawaii broke the agreement in the 1994 stipulated judgment. This disrupted the co-parenting relationship between the parties. It also has affected the relationship of the children with their Mother, as the children have sided in the custody issue with their Father (the Defendant). As a consequence, parental alienation has taken place to a high degree, reaching a point where now the children do need therapy for resuming a normal relationship with their Mother (such as existed when Defendant picked them up for visitation on June 9, 2000).

12) Since 1994 Plaintiff has always encouraged the relationship of the children with the Defendant;

The evidence shows that the children were always happy to see the Defendant for visitation when he picked them up at their Mother's house.

"Q.. ..can you tell the court when you do get the guys, Johnny and Andreas, what... .the first contact.. What it's like for them to see you when you go pick them up?

A. The first contact is an explosion of love and affection."

"And they are eagerly waiting at the window.. .and when the guys come out of the house, it's like watching the start of a thoroughbred race and.. .and I'm the goal, and it feels great. And, you know, they come runnin' out and screamin' and hollerm' and jumpin' and hugging and it's .. .it's quite a beautiful moment in time.

And that has repeated every time I'm there." (p. 16 lines 7 to 11 and lines 15 to 20, Remis Transcript, December 12, 2000) (Emphasis added).

13) The Plaintiff invites the Defendant into her house before his departure with the children:

".. .and so we sometimes linger a little bit and I think that Catherine invites me in. We.. .at some points we're cordial. And it was kinda nice, you know, in a formal way. And she would kinda like have some food ready, depending upon the time of the day and ....and something to snack on." (p. 17, lines 16 to 21, Remis Transcript, December 12, 2000) (Emphasis added).

14) The Plaintiff consents to the summer activities choices of the Defendant for the children and never interferes;

".. .and so the summer of... .of '99 was extraordinary in terms of the visit with Grandma, the summer was spent here. Actually, ever since the summer of '98,1 have

enrolled the guys at Punahou summer school. I've consulted with Catherine about it." (p. 30, lines 13 to 17, Remis Transcript, December 12, 2000) (Emphasis added).

15) Since 1998 the Plaintiff has even consented to help the Defendant do some activities (Halloween) with the children, some of which she doesn't approve:

".. .Catherine knew I was coming. I'd gotten her permission to do that. The guys did not know so it was a surprise."

"...so they're jumpin' up and down and so on and so forth. And they were just finishing lunch and I... Catherine invited me in and we had.. .1 think she had a sandwich for me. And then we hung out for a while in the house, then went out trick-or-treating." (p.33, lines 6 to 8 and 21 to 25, Remis Transcript, December 12, 2000).

"The.. .we come back, we unloaded I don't know how many pounds of candy . We had dinner. We went out again. Catherine was very concerned about going out at night."

"And so we got home and lingered for a while and the next morning at 6:30 my plane took off for Honolulu." (p 35, lines 10 to 13 and lines 22 and 23, Remis Transcript, December 12, 2000).

"Q .... Okay. And Catherine participated in helping that be a surprise?
A. Yes."
(p 94, lines 15 to 17, Remis Transcript,

December 13,2000).
(Emphasis added).

16) The Plaintiff respected and never interfered in the way the Defendant was exercising his visiting rights;

"Q.Mr. Remis, during this whole time that you've had the boys has Miss Gaudin ever expressed to you directly any concerns she had about the way you take care of the boys? (p.42, lines 21 to 25, Remis Transcript, December 13, 2000).

A. No." (Emphasis added).

This confirms the attitude and the testimony of the Plaintiff that she always respected Defendant's way of parenting.

17) The Plaintiff yielded to the Defendant's requirement for her relocation, even though it was distant from her family, but closer to the Defendant's family:

"...she originally wanted to return to her family in Switzerland, in Geneva. I strongly objected to that."

"..and Catherine unilaterally chose Montreal, or the environs of Montreal, as to where she wanted to locate. We discussed it. It was kind of a good idea in the sense that my family is primarily located in New York....." (p.6, lines 14 to 16 and lines 20 to 25, Remis Transcript, December 12, 2000). (Emphasis added).

18) The Plaintiff encourages communication between the children and the Defendant and respects their schedule:

> "Q. Yea, but actually what I was asking was as far as you know has Catherine ever done anything to prevent you from communicating with your sons the way you have described?
>
> A. As to faxes, No.
>
> Q. As to faxes and phone calls?
>
> A. Well, as to phone calls, we have a set time. Okay? And there is no other time because of the answering machine.
>
> Q. Okay. So do you have a problem with a set time?
> A. I don't have a problem with the set time..."
> (p.87, lines 15 to 25, Remis Transcript, December 13, 2000).
> (Emphasis added).

19) The Plaintiff keeps the Defendant informed of any subject regarding the children as required by the 1994 stipulated judgment:

i) For the children's education she communicated the school reports and consulted the Defendant for his opinion on home schooling by sending the following letter:

> 28 April 2000
>
> Hi There Pa! How are you doing? The boys are doing fine. Thank you for their

Easter package. We are enjoying our Bible Time "Easter Series". Enclosed are their school reports. Please let me know by in writing, by fax or mail.. .once you have your travel confirmations and your summer plans with the boys set. For their medical insurance....Village Travel 450-458-7041.

How do you feel about this?... John?.. .In my estimation, it is of highest priority that our boys receive a Christian education. I am in the process of making arrangements for their Home Schooling for Grade Five and Grade Three. I am planning to use the Bob Jones University Home School curriculum including their HomeSat program. I have asked that they send you their curriculum catalogues and the video on the Home Sat. I plan to supplement their curriculum with French grammer and perhaps some Canadian geography in French. Our pastor and his wife, Paul and Kim Pelletier, whom you met began Home schooling using the Bob Jones University Curriculum last year. His children are in the same grades as ours. My half sister, Gloria Repp, a Christian author and writer of numerous books, works for the Bob Jones University Press and from what I understand, writes some of their curriculum reading material. The boys are already reading and enjoying a few of her books! We are looking forward to this new and exciting experience!

Take care of yourself, John,

Aloha, Catherine.

Isaiah 54:13 "And all thy children shall be taught of the Lord; and great shall be the peace of thy children."
Esaie 54:13 "Tous tes fils seront disciples de l'Eternel, Et grande sera la prosperite de tes fils."

(Exhibit C-4) (Emphasis added).

The Defendant in cross-examination gave the following answer regarding that letter. "

Q. Okay. When you got this, did you respond to it? A. Not in writing

Q. How?

A. Well, I call every Saturday, and so oft times she answers the phone. Sometimes it's the boys, and I just said that I don't think it's a good idea."(P-1 16 lines 8 to 13, Remis Transcript, December 13, 2000). (Emphasis added).

ii) For Johnny's shortness of breath and chest pains she informed the Defendant and went to see a doctor;

"A. .. the first notice that Johnny was suffering from shortness of breath and chest pains was correspondence from Catherine. And so that letter I got on.. .I think it was a Thursday." (p. 101, lines 13 to 16, Remis Transcript, December 13, 2000). (Emphasis added).

Then Defendant after discussing that issue on the phone with Plaintiff sent the following fax on May 27, 2000: Dear Catherine,

Seems Johnny is experiencing more than growing pains. Did the Dr. do an EKG? Most of the heart tests I've read about probe blockage of vessels which is most unlikely for Johnny. Have you been referred to a cardiologist? My Dad died of cardiac arrest. A diagnosis of angina was made in 1972. Prior to that Dad had chosen the Dr. Atkins diet and indulged in bacon and other fatty foods with relish. Of course, he smoked 3 packs of cigarettes a day. After the diagnosis, Dad changed his diet completely and undertook daily exercise. In 1991, the average life expectancy for a white male was 73. My last full half-day physical in 1998 led to a comment by the Dr. that I had the internal chemistry/function of a 25 year old.

I'll be in Hudson on 6/10, about 9:00AM. Our itinerary will be similar to years past. We'll leave Grandma's on 6/20. Classes begin 6/19 and the school knows the boys will start 6/21. Classes run from 8-12. Unless court intervenes, I shall pick the guys up and spend the balance of the day with them. Our usual Big Island visit has not yet been set. We'll arrive back in Hudson 8/5. You will be called

4:30 on Saturdays. I shall have the usual health insurance secured thru Village Travel on 6/5 and ask that they call you for pick-up.
Thank you for my traditional birthday song and the boys for their cards. Seems there has been a nagging cold/sore throat bug in The Islands. Just when you think it's gone, it bites again.
Mom is doing well with her gardening, weather permitting.
Aloha for now,
(Exhibit C-5). (Emphasis added).

The Defendant explained about the reason for sending the fax:

"A.. .This was.. .this was in answer to a question from Catherine to.. .she said what is your Dad's condition and what is your condition, because of her concern about the heart." (p. 105, lines 10 to 13, Remis Transcript, December 13, 2000).

"... .my question to you is did you have further communications with Catherine about that condition? that Johnny had?

A. We had conversation in .about that, yes.

Q. And when you came in June?

A. I'm not sure when the conver... .it was after I knew what had happened and I think I'd asked her if she'd done anything else other than go to... .because she had told me before that everything's okay.
So at that point in time I had asked her if there

were any follow-ups. Okay? And she said everything was fine, and she didn't go back to the Doctor. And so that ended it. Coupled with the information that I received from Johnny, coupled with the fact that there weren't any further episodes, Ithat was the end of my inquiry." (p. 106, lines 4 to 19, Remis Transcript, December 13, 2000). (Emphasis added).

20) The Plaintiff sees to it that the children remember their Father's Birthdays:

"Q. Okay. Then at the bottom of this letter of May 27th, you say thank you for my traditional Birthday song and the boys for their cards. Well, what is the traditional Birthday song?

A. Catherine sings .. .plays the piano and sings

Happy Birthday.

Q. on the ... .on the phone?

A. On the phone.

Q. And then the boys send you cards on your.. ..for

your Birthday?

A. I would say, yeah. I mean, they do send me cards when they get there. It's .. .but for the most part, yes.

Q. Okay. So they generally give them to you when you get here?
A. No, no. I've gotten cards in the mail." (p.l 10,

lines 3 to 18, Remis Transcript, December 13, 2000).

"Q. Do you know if Catherine has been part of the effort to see to it that Dad gets his Birthday cards?

A. Of course she's been part of the effort".
(p.1 11, lines 1 to 3, Remis Transcript, December 13, 2000).
(Emphasis added).

21) Defendant has had physical custody of the children for the last 7 months resulting in parental alienation from their Mother:

The action of the Father in not respecting the stipulated Judgment, has caused harm to the children and contributed to the parental alienation from their Mother. The custody issue could have been reviewed according to the stipulated judgment by a Canadian family court and thus would not have involved the children in jurisdictional court conflicts and procedures.

The children have now sided with the Defendant against their Mother and have nothing positive to say about their Mother. This behavior of the children towards their Mother was sudden and markedly obvious only since the Defendant picked them up for their summer visitation on June 9, 2000 and has continuously escalated since that time. This shows that the Defendant is not able to maintain and encourage the relations of the children with the other parent .The Plaintiff on the other hand has always encouraged and maintained those relations with the

Defendant.

22) **The Plaintiff is very flexible, which is an appropriate quality for the custodial parent, as shown by the following events;**

a.) Plaintiff requested at the beginning of the Family Court trial that a family psychological assessment and evaluation be done for the best interest of the children. The Defendant strongly objected to that proposal, apparently because of the level playing field it would have created, something one would have expected Defendant Remis to welcome ;

b.) Plaintiff testified that if there is change to be made in her parenting, she is willing to do so for the best interest of the family.

23) This Court was misled by the evidence produced as exhibits by the Defendant in the Federal Court proceedings.

The following documents produced by the Defendant in the Federal Court as exhibits were proven during the course of the Family Court trial to contain false and misleading allegations:

a) The July 26, 2000 defendant's declaration supporting the *ex parte* motion.

Defendant at that time was exercising his visiting rights from June 9th until August 5th and could have sought the same judgment by the Canadian court while keeping the children in Hawaii under

his visiting rights. By not doing so, the Defendant committed a breach of the Hague Convention which leads to "harmful effects" to the children (see preamble of the Hague convention) which is in itself against the best interests of the children because it deprives them of a custody hearing in the country of their habitual residence, which Canada has been for the past six years. • The Defendant in his declaration supporting the *ex parte* motion stated:

> " I met with Dr. Lehrke on July 20, 2000, for a review of the current status of Catherine's conduct and the negative effects on John and Andreas, it was Dr. Lehrke's opinion that Catherine's mental state was deteriorating and there was a real concern for the welfare of the boys." (Exhibit D-1, *Ex Parte* Motion, Declaration of John R. Remis, Jr. P.3, lines 3 to 7) (Emphasis added).

• However, contrary to defendant's declaration, Dr. Lehrke's testimony was to the effect that she had no opinion about Catherine, but in fact it was the Defendant who felt the children needed to be seen not her:

> " Q. All right. So the next time that you saw anybody in connection with the Remises would be in a meeting on July 20th, 2000 ?
>
> A. Yes
>
> Q. And what did Mr. Remis tell you he wanted to have that meeting about ?

A. He indicated that, um - - that he was again worried about the children that he felt that I should see the children because they seemed upset to him, um, he said that, again, John, Jr., appeared even more depressed than before and sullen, and that he felt - - he felt the children were not very communicative. He thought their personalities were changing, and he had - - they were talking to him about the prospect of their mother home schooling them and saying that they really did not want that, and so he felt they needed to be seen, (p.31 lines 7 to 23 Lehrke Transcript, December 19, 2000) (Emphasis added).

- The Defendant also alleged in his declaration supporting the *exparte* motion :

"- - it is urgent that a temporary change of custody be granted and a psychiatric evaluation of Catherine be undertaken. - -" (Exhibit D-1, p. 3, lines 11 and 12 *ex parte* motion, declaration of John R. Remis). (Emphasis added).

The urgency of the best interest of the children was not the motive for the defendant's *ex parte* motion to the Hawaii family court on July 27, 2000, for the following reasons:

- The Defendant, exercising his visiting rights, picked up the children in Canada on June 9, 2000;
- According to the Defendant's testimony, when he had his first visit with Dr. Lehrke in 1999, he should have returned to consult her if something "happens" or

if' 'something' gets worse" with the children:

> "So I went to find out what if anything I should do and basically I left there, in terms of Dr. Lehrke's office here, with the fact that the boys were healthily rejecting these actions to this point in time, with a recommendation that if something happens I should return." (p.41 Remis lines 19 to 23, Transcript, December 12, 2000). (Emphasis added).

- According to the Defendant's testimony, the children at the time he picked them up this year for summer visitation, were supposedly in the worst state they had ever been.

> " Q. - - Can you tell the court briefly your observation of the children when you picked them up this year for summer visitation" (p. 7 lines 25 and p. 8 lines 1 and 2, Remis Transcript, December 13, 2000).

The Defendant described from pages 8 to 13 of his December 13 transcript testimony, how bad the condition of the children was, concluding that:

> " I knew this was beyond my ability to heal it, and consulted again with Dr. Lehrke, because she said come back if somethin' gets worse and --and this was **much much much worse.**" (p. 12 line 25 and p. 13 lines 1 to 3, Remis Transcript, December 13, 2000). (Emphasis added).

- However, even though the children's state was supposedly "much much much worse", the Defendant chose not to follow Dr. Lehrke's

recommendation and did
not consult with her while the children were supposedly in that state. The
Defendant waited two (2) months to consult with Dr. Lehrke (August 3, 2000),
which coincides with the period of time when he received notice of proceedings
from Plaintiff in Canada (July 26, 2000) and when he started to petition the
Hawaii Family Court for change of custody (July 27, 2000) at which time the
hearing date was set for August 31, 2000;
The Defendant made the decision to make an appointment with Dr. Lehrke to see the children on August 3, 2000, only after his *ex pane* motion of July 27, 2000. " Q. Okay. When was the decision made to bring the boys in August 3 ?

A. I think the decision was I'm gonna make an application for temporary custody and if it were granted I would then bring the boys in. So I - -I assume as I - -I don't exactly remember making the appointment date wise, but it would have been after the 27th because that's when the order was signed and that's when I made the appointment so that they could be evaluated."(p.31 lines 1 to 9, Remis

Transcript, December 14, 2000).

Apparently, once the children were with the Defendant on June 9, 2000, they changed for the better. When asked how the children were doing since he picked them up, the Defendant stated:

" Q. Between the time you picked them up until now.
A. Oh absolutely,

A. - -Ab - - the - - the changes are enormous we've had - - well, the cha - -the changes I would say from perhaps three weeks into the summer, so it would be approximately the beginning of July, Johnny started to stutter less. There was a more relaxed attitude." (p. 14 lines 24 and 25, p. 15 lines 4 to 8, Remis Transcript, December 13, 2000)

"----- I can see that whatever was disturbing them was becoming more

relaxed." (p.15 lines 13 and 14, Remis Transcript, December 13, 2000). (Emphasis added)

Except for one additional visit on November 10, 2000 with Dr. Lehrke at the request of the Defendant (following the police report and the CPS intervention), there was still no therapy started for the children as of the date of the Defendant's testimony on December 14, 2000:

"Q. Okay. And then subsequent to November 10th she wrote you a letter dated November 17th' correct?

A. I'm not sure what the date of the letter was" (p.34 lines 2 to 4 Remis Transcript, December 14, 2000).

"Q. Okay. And now, have you spoken to her since you received that two page report?

A. Yes.

Q. Okay. What about?

A. About therapy for the boys" (p.34 lines 11 to 15, Remis Transcript, December 14, 2000).

"Q. Okay. Has there been any therapy of John or Andreas between that report date of November 17th and today?

A. No"

(p.36 lines 6 to 8, Remis Transcript, December 14, 2000).

"Q. Okay. And now, can you tell me why the treatment hasn't started with Johnny as of the 14 of December?

A. I have an appointment with Biodyne

- December 29th I think is what the earliest appointment was - And so the next available date of treatment, to enroll them both in treatment right is the beginning of January." (p.40 lines 15,17,18 and 22 to 24, Remis Transcript December 14, 2000)(Emphasis added).

b) The August 30, 2000, affidavit of Dr. Sue A.

Lehrke and Dr. Lehrke's letter of November 17, 2000.

Judge Bryant in his September 2000 order, granted

Defendant's motion for temporary physical and legal custody and denied plaintiffs application to decline jurisdiction, saying that:

" The court further finds that a grave risk exists that the children will be psychologically harmed if they were returned to their mother" (Exhibit D-2, Order p.2, September 25, 2000) (Emphasis added).

The Court believed this to be true "significantly based" upon the report of Dr. Sue Lehrke.

" This Court especially believes this risk exists as to the content of the proposed home-schooling (i) of the children, and more significantly, based upon the report of Dr.

(1) There is no allegation or evidence whatsoever to support a finding relative to the quality or the content of the home schooling. The Defendant testified at the Family Court trial that he did not know the content of the home schooling program at all.

> " Q. Okay. Now do you have a problem with the content of the curriculum in the home school program?" A. I don't know its content (p.121, lines 20 to 22, Remis Transcript, December 13, 2000).

Susan Lehrke, that the children's' mental health is under severe stress...."(Exhibit D-2, Order P.2, September 25, 2000) (Emphasis added)

- The Defendant knew and never disclosed to this Court, that Dr. Lehrke would not testify to support the opinion about custody and visitation that she stated in her affidavit:

> "Q. So then you knew at least when you drafted the letter that what you were putting in that letter was potentially gonna be used by Mr. Remis to assist him in his effort to change custody of the children:
>
> A. No, that's not an accurate statement.
>
> Q. Oh, it'snot?
>
> A. Nope.
>
> Q. In what way is it not accurate ?
>
> A. I told Mr. Remis early on, and I kept repeating it to him, that he needed to have the court appoint a custody guardian ad litem to do an investigation of the case. And that once a Custody Guardian Ad Litem was in place, I would defer to that person's findings and recommendations (2) and that I - - I had told him, I don't know, maybe five times, that I will not make any comparative

> statements with respect to a custody determination. I've also told Mrs. Chang that. That's not my role." (p.38, lines 10 to 25, Lehrke Transcript December 19, 2000). (Emphasis added).

The reason she met with the children was for interview purposes and no tests were made:

> " Q. All right. And what - - did you perform any tests with each - - with either of the boys?
>
> A. No
>
> Q. What's the protocol on - - in an initial meeting with a child?
>
> A. Generally, the first one or two meetings are diagnostic evaluations, which means interview evaluation." (p.33, lines 8 to 14, Lehrke Transcript, December 19, 2000) (Emphasis added).

(2) Much was made by Dr. Lehrke of her primary role being for the purpose of seeing to it that a CGAL was appointed, yet none of her letters of August 29, 2000 (Exhibit Y) and November 17, 2000 (Exhibit 17) or her affidavit of August 30,2000 (Exhibit B) mentions this need at all. Rather, the only time it is mentioned is in her letter to Mrs. Chang and Mr. Lynch dated December 15, 2000, and then as a rationale why she wouldn't be testifying about any opinion (Exhibit 15).

- The fundamental and essential fact revealed by the Family Court trial is that Dr. Lehrke's affidavit and letter which have been cited by Judge Bryant, Marianita Lopez and Judge King as the significant factor in the foundation and declaration of "grave risk" of psychological, harm are false and misleading in the extreme to the point that according to Dr. Lehrke, her opinion should not be given much weight at all:

> " A. - -. The therapist has such a limited point of view on the case that their information is not of very great weight in my opinion legally." (p.56 lines 3 to 6, Lehrke Transcript, December 19, 2000) (Emphasis added).
>
> " A. My role in the case is so limited, my point of view on it is very limited. - -." (p.24 lines 2 and 3 Lehrke Transcript December 19, 2000).(Emphasis added).
>
> "A. - -. And once the custody guardian ad litem came on the case, in my opinion, my - - my opinions are no longer - - should no longer be given as much weight as the custody guardian ad litem's. - -." (p.27, lines 5 to 8, Lehrke Transcript, December 19, 2000) (Emphasis added).

In fact there was great reliance by the CGAL, Judge Bryant of the Hawaii Family Court and Judge Samuel P. King of the U.S District Court for the District of

Hawaii on the four page Lehrke affidavit prepared by Defendant Remis (based on a Lehrke letter to Remis dated August 29, 2000) This affidavit was prepared by Dr. Lehrke to 1) explicitly assist Remis to take custody of his children from their Mother and 2) did so by stating in the affidavit an opinion that would cause the reader to believe that there would be significant psychological harm to the children if they returned to their mother. This opinion was rendered by Dr. Lehrke notwithstanding that she never had any ability or intention to opine on a recommendation of custody of these children and would therefore refuse to testify as to the conclusion in the affidavit and notwithstanding that she did not know what was " really going on here":

> "A. I really don't have opinions about the overall situation at this point because I feel that's the job of the custody guardian ad litem, to look at it from all angles and - - and say what's really going on here;" (P. 52 lines 5 to 8, Lehrke Transcript, December 19, 2000). (Emphasis added).

- Following her observation of the children on August 3, 2000, Dr. Lehrke finds the condition of the children is not serious enough to prevent them from returning to Canada; in fact, she admitted that the children could be returned to Canada to their mother's home so long as they received treatment, which she would have recommended by letter :

" Q. And so did you determine that they needed treatment ?

A. I thought that they would probably need treatment. I didn't know whether they were going to be here or in Canada, but I told Mr. Remis that I thought they were probably gonna need treatment.

Q. Okay. I take it from your statement that if they went back to Canada that is something that they could do so long as they were receiving treatment.

A. I would have recommended at that point that they, um, have treatment in Canada. Probably by letter." (p.34, lines 3 to 13, Lehrke Transcript, December 19, 2000) (Emphasis added).

3) This Court was not informed that Dr. Lehrke's Letters and Affidavit, were in fact and in law incompetent under the mandatory requirements of the American Psychological Association Ethics Code:

a) Dr. Lehrke's Letters, Affidavit, and testimony are incompetent and irrelevant and should not be given any weight by this Court;

i) Dr. Lehrke performed forensic functions for John Remis in this case and did so in direct violation of the mandatory rules for psychologists in such cases, and then deliberately misled the family court under oath.

Paragraph 5 of the affidavit of Doctor Lehrke demonstrates that she gave an unqualified opinion on the ultimate issue, child custody, via affidavit in a

contested case:

> " 5. As a result of my evaluation of Andreas and John A. Remis, I have significant concerns about their mental health. Specifically, it is my opinion, based upon information available to me to date that the return of these boys to live with their mother would result in significant damage to their mental health." (Exhibit D-3, affidavit of Dr. Sue A. Lehrke) (Emphasis added).

By giving this expert "opinion" on the psychological characteristics of the Plaintiff whom Dr. Lehrke had not met, Doctor Lehrke performed a forensic function as defined by the Ethics Code of the American Psychological Association (APA Ethics Code). A "forensic function" refers to professional activities performed by a psychologist in legal and judicial contexts, regardless of whether she identifies herself as a "forensic psychologist".

The APA Ethics Code states: "7. Forensic Activities
7.01 Professionalism

> Psychologists who perform forensic functions, such as assessments, interviews, consultations, reports, or expert testimony, must comply with all other provisions of this Ethics Code to the extent that they apply to such activities." (Exhibit C-6, Ethics for Psychologists p. 146) (Emphasis added).

The commentary accompanying this section of the APA states:

"This section of the Ethics Code is not just for the use of 'forensic psychologists', it is for all psychologists when they are performing forensic or potentially forensically relevant functions." (Exhibit C-6, Ethics for Psychologists p. 145 lines 1 to 3) (Emphasis added).

The APA Ethics Code further states: "7.01 Professionalism 7.02 Forensic assessments

(a) Psychologists' forensic assessments, recommendations, and reports are based on information and techniques (including personal interviews of the individual when appropriate) sufficient to provide appropriate substantiation for their findings." (Exhibit C-6, Ethics for Psychologists p. 147 and 148) (Emphasis added).

The commentary on Section 7.02 (a) states:

"By contrast, in doing custody evaluations, interviewing both parents is expected, with efforts made to arrange such meetings. Failure to interview a parent calls for explanation of why the interview could not be held, and that omission must be reflected in the report of and scope of findings. As discussed in the next section^ custody recommendation, for example, may not be possible in these circumstances."(Exhibit C-6, Ethics for Psychologists p. 148 line 15 to 21) (Emphasis added).

The APA Ethics code further states: "7.02 Forensic assessments (a)....

> (b) Except as noted in (c), below, psychologists provide written or oral forensic reports or testimony of the psychological characteristics of an individual only after they have conducted an examination of the individual adequate to support their statements or conclusions". (Exhibit C 6, Ethics for Psychologists p. 148)

The APA Ethics code specifies the limitations on expert opinions in cases such as this: " 7.02 Forensic assessments

> (c) When, despite reasonable efforts, such an examination is not feasible, psychologists ... appropriately limit the nature and extent of their conclusions or recommendations." (Exhibit C-6, Ethics for Psychologists p. 149) (Emphasis added).

The commentary on Section 7.02 (c) states:

> "This section provides guidance in situations when, despite reasonable efforts, the psychologist may be unable to do the personal examination addressed in 7.02b. It addresses three considerations.
>
> **First**, it requires that 'reasonable efforts' have been made to do the examination of the individual and these have not been successful.

(Exhibit C-6, Ethics for Psychologists p. 149 line 26 to 30) (Emphasis added).

Second, when the evaluations have proceeded, the data are considered to be "limited", and the psychologist, in reports and testimony, must explain how the limited evaluation affects the reliability of the 'reports and testimony'. (Exhibit C-6, Ethics for Psychologists p. 149 line 44 to 45, p. 150 lines 1 and 2) (Emphasis added).

Third, this rule requires that when the personal examination has not occurred, the psychologist refrains from drawing conclusions and making recommendations that go beyond the limits of the data.

In other words, even if the psychologists follow the stipulations, clarify that the impact of the information is limited, and limit the nature and extent of their conclusions or recommendations accordingly, there are some types of conclusions and recommendations that are precluded. Under this standard, in a child custody case in which only one parent was evaluated and it was not feasible to evaluate the other, although the psychologist may make statements about the parent who was not seen as long as he or she does not go beyond the data and does qualify conclusions by acknowledging the limitations imposed by the incompleteness of the data collected, it would generally be improper for the psychologist to offer an opinion of the missing parent's parental

qualities or make a custody recommendation." (Exhibit C-6, Ethics for Psychologists p. 150 line 15 to 17, p. 150 lines 19 to 29) (Emphasis added).

Dr. Lehrke knew that her affidavit would be used in adversarial child custody proceedings. She therefore performed a forensic function in this case notwithstanding her subsequent representation to the court that she is only a "child psychologist" or a "treating psychologist" and not a forensic psychologist or a psychologist performing forensic function.

When asked by Plaintiffs counsel whether she knew the purpose for which her affidavit had been sought by the Defendant she replied:

> A. I was aware that he was going to use the affidavit, attach it to something that he was presenting to the court.
>
> Q. Yeah, but you do know and you've been down here a fair amount of - -number of times. You do know that what he was doing was going for a change in custody from their mother to himself, correct?
>
> A. Yes.
>
> (p.37, lines 13 to 21, Lehrke Transcript, December 19, 2000) (Emphasis added)

Dr. Lehrke also knew that her report dated November 17, 2000 would be used in adversarial legal and judicial activities,

Q. Okay. As you understand it, did Mr. Remis ask you for this written report dated November 17th?

A. Yes.

Q. Okay. And your first sentence says to whom it may concern. Now, if I may ask you, why is it addressed that way?

A. Well, Mr. Remis asked me for an update on my treatment. And ordinarily this would go to the court or to the custody guardian ad litem. He asked me just to send it to him. And since it's a - it's a kind of a generic update, I just addressed it to whom it may concern and figured it would probably end up in court, (p.52 lines 21 to 25, p.53 lines 1 to 7, Lehrke Transcript, December 19, 2000) (Emphasis added).

Dr. Lehrke said that she belongs to the American Psychological Association and subscribes to their ethics.

Q. All right. Let me just - - do you subscribe - - do you belong to the American Psychology Association?

A. Yes.

Q. And do you subscribe to their ethics?

A. I subscribe to their ethics whether I like it or not.

(p.57 lines 14 to 19, Lehrke Transcript, December 19, 2000) The commentary on the APA Ethics Code regarding "Forensic Activities" further states:

> "It should be emphasized that psychologists who render expert testimony in court are not 'just giving opinions,' they are providing expert opinions based on professional knowledge, skill, and techniques. Their opinions have much weight and can have great effects on the lives of the individuals concerned." (Exhibit C-6, p. 145 line 32 to 36) (Emphasis added).
>
> "They need to be aware that an incompetently performed custody evaluation and attendant testimony could lead to an individual's inappropriate loss of his or her children. It is clearly, then, of the utmost importance that assessments and tests done for the court meet the applicable standards set in this section of the Ethics Code and that requirements of all other related standards be met." (Exhibit C-6, Ethics for Psychologists p. 146 lines 25 to 30) (Emphasis added).

Dr. Lehrke seems to have ignored the impact of her affidavit and letters in this case, and subsequently attempted to mitigate the effects of her opinion, but it was too little compared to her affidavit of August 30 and letter of November 17, and too late (12/19/00) to avoid the damage she caused.

> " A. My role in the case is so limited, my point of view on it is very limited. - -." (p 24 lines 2

and 3, Lehrke Transcript, December 19, 2000).(Emphasis added).

"A. - -. And once the Custody Guardian Ad Litem came on the case, in my opinion, my - - my opinions are no longer - - should no longer be given as much weight as the custody guardian ad litem's. - -." (p.27, lines 5 to 8, Lehrke Transcript, December 19, 2000) (Emphasis added).

Dr. Lehrke knew the importance of contacting the Plaintiff, but was professionally incompetent in failing to do so, causing the Plaintiff irreparable harm in this case. Dr. Lehrke is now claiming that section 7 of the Code does not apply to "treating psychologists" in ignorance (or worse) of the definition of "forensic function";

Q. (BY MR. LYNCH) When despite reasonable efforts said - - this is the canon itself, 7.02 (c), as in Charles. When despite reasonable efforts such an examination is not feasible, psychologists clarify the impact of their limited information on the reliability and validity of their reports and testimony, and they appropriately limit the nature and extent of their conclusions or recommendations.

Now, would that apply to your role as a child psychologist?

A. If it's a - - if it's a canon re - - related to forensic psychology, it would not apply to my

role as a treating psychologist. But I did in fact state some limitations of my data and I did in fact qualify my conclusions.

Q. Well, you're saying that you've complied with this rule notwithstanding it doesn't apply to your role?

A. I'm - - I' m - - not saying whether I complied or didn't comply with it. I'm saying that is a rule for forensic psychologists and I was functioning as a treating psychologist. But I am saying as a matter of fact that I did in fact state the limitations of my data and I did in fact qualify my conclusion.

Q. Okay. In the four-page affidavit, which is - - that we've been talking about, the one that's dated August 30th, where are the limitations?

A. It's my opinion - - first of all, it's based on the information available to me to date, which is limited.

(p. 66 lines 9 to 25, p.67 lines 1 to 10, Lehrke Transcript, December 19, 2000) (Emphasis added).

In fact the distinction attempted by Dr. Lehrke does not exist in this instance, and it is incomprehensible that she did not know that when she attempted to fool the Court and the parties. She was under oath and intentionally sought to mislead the Court and counsel so as to draw attention away from her gross negligence if not intentional behavior.

The commentary to Section 7.02 (c) provides that under circumstances present here, "... it would generally be improper for the psychologist to offer an opinion of the missing parent's parental qualities or make a custody recommendation."

Dr. Lehrke's professional incompetence by making such a report in violation of section 7 of the Code is exacerbated by her apparent gross negligence or wanton disregard in not knowing the rules of practice for licensed psychologists. "

Q. I am talking about a forensic psychologist.

> A. Um, I don't know whether a forensic psychologist can offer opinions to the court based on limited information or not. Generally, though, it's not the common practice. I don't know whether there are exceptions, but in general that would not be the common practice." (p. 71 lines 17 to 22, Lehrke Transcript, December 19, 2000)

Dr. Lehrke admitted that her affidavit and report should never have been used the way it was;

> "A. I think I might not have worded that sentence as well as I should have. I think that, you know, when I read it now I can see that it can be read in other ways, but that is all I was intending to do at that point. And I apologize if the wording of that -- those sentences caused problems in the case."(p.63, lines 16 to 21, Lehrke Transcript, December 19, 2000) (Emphasis added).

In conclusion the following breaches of the Code by Dr. Lehrke are at minimum professional negligence and produced an incompetent report/affidavit:

- Dr. Lehrke did not make any attempt to contact the Plaintiff while doing the forensic task of evaluation of her two boys and in giving an opinion on the plaintiffs parental qualities;
- Dr. Lehrke's report did not properly qualify the impact of her limited information by not explaining how her limited evaluation would affect the reliability and validity of her entire report;
- Dr. Lehrke at the trial essentially withdrew her opinion, claiming that it was not within her role as a "child psychologist" to render an opinion and that she was not doing "forensic"work (even though Judge Bryant used her affidavit as grounds to award a temporary change of custody of the children to the Defendant);
- Dr. Lehrke admitted "surprisingly"at the trial that her report should not be given much weight at all. However, it had a lot of weight when it was presented to judge Bryant and this Court in this case, leading the Plaintiff to lose the custody of her children ;

That leaves the Defendant with no valid expertise (or opinion) on psychological harm that would be considered a "grave risk" by clear and convincing evidence.

All defendant has is his own self-serving statements related to hearsay statements to him.

4) The Defendant never disclosed to this Court that his objective was to petition the Hawaii Family Court only for a more convenient forum for himself and for his solely personal and economic concerns;

Defendant was served on July 26, 2000 with a motion of the Plaintiff in recognition and enforcement of foreign decisions that led to a decision declaring the 1994 Family Court judgments enforceable in the Province of Quebec, Canada (Exhibit C-1). On July 27, 2000 Defendant petitioned the Hawaii Family Court with his *exparte* motion for temporary restraining order and order awarding temporary custody of minor child instead of petitioning the Canadian Family Court which, contrary to his protestation otherwise,cannot be explained other than that he did so for a more convenient forum for himself and for his personal economic concerns;

- The Defendant sent an e-mail to plaintiff on July 2, 2000 stating clearly his intention to proceed to a change of custody, if Plaintiff would not cancel her plans for home schooling the children.

> " Dear Catherine, it is my firm belief that it is not in the best interest of John Anolani Remis, IV and Andreas Wailani Remis to be home schooled. It is asked that you consider a change in custody

now. It is further requested that you advise me as to whether or not you will cancel your plans for home schooling this coming year and forever. I ask you to enroll John and Andreas in St. Thomas for the fall. Your response is requested by 7/8/00. If you do not agree, I shall take all steps reasonable and

necessary to effect a change of custody of our sons....." (Exhibit 5).

(Emphasis added).

- The Defendant made a clear admission in his testimony that the reason he had petitioned the Hawai'i family court instead of the Canadian family court, was for personal financial reasons only:

" Q. Okay. So would it be fair to state that if she had turned around by July 8th and said, okay, I won't do home schooling, then you would have sent the boys back on August 5th? Or taken them back on August 5th?

A. Maybe.

Q. What do you mean maybe?

A. Well, because the reality is - - is that this was like the beginning of July, and another week passed by and I started researching the potentials for dealing with the issue that was in the judgment about having

Canadian court have jurisdiction just by the clause that was in the agreement. And so I - -I thought I was stuck with going there. Okay?

And then I - -

Q. Why - - excuse me. Why did you consider that stuck?

A. Well, you've seen my financial statement. Okay. In terms of the effort of-- of pursuing this, I - -I don't know how I could possibly have pursued this in Canada. I just don't know.

Q. Because you couldn't afford an attorney in Canada, is that what you're saying?

A. An attorney, traveling costs, all of that. And - - and so I began to research to see what is the jurisdictional issue to permit me to proceed here. - -." (p. 186, lines 2 to 25 and p. 187, lines 1 to3, Remis Transcript, December 13, 2000). (Emphasis added).

Thus the reason for petitioning the Hawaii Family Court instead of the Canadian Family Court, was not based upon the condition of the children and their Mother, but for the obtaining of a less expensive and more convenient forum for the Defendant. The Hague Convention goal is to prevent the course of action that has been taken by the Defendant, which is "forum shopping" in order to find a more sympathetic Court at less cost to him. Those actions have been

condemned by the jurisprudence as being in direct violation of the content and spirit of the Hague Convention. (Exhibit P, Friedrich vs. Friedrich (6th Cir. 1996) 78 F. 3d 1060).

i) The Defendant engaged in an abuse of process in order to obtain a more convenient forum;

The *exparte* motion for restraining order and temporary custody in Family Court is designed to be used only for urgent matter, because it involves omitting notice to adverse parties. Rule 65 of the Hawaii Family Court Rules states as follows:

> "VIII. Provisional and final remedies and special proceedings
>
> Rule 65. Injunctions.
>
> (a) reserved.
> (b) Restraining order; notice; hearing; duration. A restraining order may be granted without notice to the adverse party when it clearly appears from specific facts shown by affidavit or by the verified complaint or cross-complaint that immediate relief to the applicant is appropriate. Every restraining order granted without notice shall be served forthwith upon any party or parties affected by the order and shall continue in effect until further order of the court. On 2 days notice to the party who obtained the restraining order

> without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require." (Emphasis added).

The Defendant by waiting until the end of his summer visiting period to file his *exparte* motion (July 27, 2000) abused the process of the Family Court, and this is shown by the following facts:

- All the facts stated in his Declaration were known at the time of his summer visitation on June 9, 2000, as at that time supposedly they were in the "much much much worse" state;
- The Defendant then waited two (2) months before bringing the children to Dr. Lehrke demonstrating that there was no "urgency";

The Defendant in his declaration supporting the *exparte* motion stated:

" I met with Dr. Lehrke on July 20, 2000, for a review of the current status of Catherine's conduct and the negative effects on John and Andreas, it was Dr. Lehrke's opinion that Catherine's mental state was deteriorating and there was a real concern for the welfare of the boys." (Exhibit D-I, *exparte* motion, Declaration of John R. Remis, Jr. P.3, lines 3 to 7) (Emphasis added).

However, contrary to Defendant's declaration, Dr. Lehrke's testimony was to the effect that she had no opinion about Catherine, but in fact it was the Defendant who felt the children needed to be seen not her:

" Q. All right. So the next time that you saw anybody in connection with the Remises would be in a meeting on July 20th, 2000 ?

B. Yes

Q. And what did Mr. Remis tell you he wanted to have that meeting about ?

A. He indicated that, um - - that he was again worried about the children that he felt that I should see the children because they seemed upset to him, um, he said that, again, John, Jr., appeared even more depressed than before and sullen, and that he felt - - he felt the children were not very communicative. He thought their personalities were changing, and he had - - they were talking to him about the prospect of their mother home schooling them and saying that they really did not want that, and so he felt they needed to be seen, (p.31 lines 7 to 23 Lehrke Transcript, December 19, 2000) (Emphasis added).

The Defendant knew he was "stuck with going" to the Canadian family court, but supposedly did not have the financial resources to do so (even though he did have a Canadian attorney for representation on the motion under the Hague Convention in Canada) (Exhibit C-2, page 6);

The Defendant knew there was no urgency but chose to proceed by an *exparte* motion in order to give jurisdiction to the family court in Hawai'i without notice;

- The Defendant never asked the Plaintiff for her consent to go see Dr. Lehrke, and then also used the *exparte* motion to avoid the necessity of doing so:

> " Q. Okay. Did he give you any explanation as to why having picked them up on June 9th he waited till July 14th to call for an appointment.
>
> A. Well, I understood that it was not very clear whether the boys were even going to be here long enough for me to be seeing them. And also there were - - there were some things going on in court that - - I had told Mr. Remis that there was no way I could see the boys unless their mother agreed, - -." (p.32 lines 3 to 11, Lehrke Transcript, December 19, 2000) (Emphasis added).

- The Defendant knew and never disclosed to this Court, that Dr. Lehrke would not testify to support the opinion about custody and visitation that she stated in her affidavit (p.38, lines 10 to 25, Lehrke Transcript December 19, 2000);
- The Defendant admitted in his testimony that he would have returned the children if the Plaintiff had renounced home schooling;

therefore all the other issues he stated in his *exparte* motion declaration were not only not an urgent matter, but in fact had no real substance (p. 187 lines 18 to 25, Remis Transcript, December 13, 2000);

- Home schooling in itself was not an urgent matter as the Defendant had known that issue in April 2000 before taking the children for visitation in Canada on June 9, 2000 (see Exhibit 5);

Therefore there was no need for any immediate relief for the defendant justifying the use of any special proceedings.

ii) Complication of procedures for the Plaintiff because of the Defendant's action: The actions of the Defendant have triggered a number of otherwise unnecessary procedures for the Plaintiff under the Hague Convention in Canada, Hawaii and California. This has led to the judgment declaring the international abduction of the children (Exhibit 13), a motion to decline jurisdiction in the Family Court of Hawaii, a petition under the Hague Convention to the U.S. District Court of Hawaii and appeal to the 9th circuit Court of Appeals.

The Defendant placed the Plaintiff in a position where she had to litigate in different courts in order to assert and protect her rights under the 1994 Hawaii stipulated judgments which stated that:

"should consent/consultation not be reached,

> and furthermore on all matters concerning this judgment, any decision should be subject to the determination of a court of competent jurisdiction in the country in which the Mother and the child
>
> are residing, taking into consideration the best interest of the child." (Exhibit E-1 and E-2, Stipulated Judgment p.7) (Emphasis added).

Furthermore, Defendant by his actions directly and deliberately breached the 1994

stipulated judgment.

The best interest of the children could not justify the petitioning of the Hawaii court

because the same result (the temporary physical and legal custody order) could have been

obtained by petitioning the Canadian Family Court in the same time frame (from June 9,

2000 to August 5, 2000).

On the other hand, what it did do was to create more procedures, more confusion, more

delay, contributed to alienate the boys from their Mother, and incurred more costs

for Plaintiff and deprived the Plaintiff of a custody hearing in Canada which is the

proper Forum according to the Hague Convention, the Jurisprudence, and the 1994

Hawaii stipulated judgment.

5) The November 20, 2000, Report of the Custody Guardian Ad Litem, Marinita Lopez, Esq.,

a)The Custody Guardian Ad Litem report should not be considered by this court as evidence to determine the "grave risk"issue for the following reasons:

i)The Custody Guardian Ad Litem is an attorney for the children and is bound by the Hawaii rules of professional conduct:

Rule 1.2 Scope of Representation

"A) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraph (C), (D) and (E), and shall consult with the client as to the means by which the objectives are to be pursued. A lawyer shall abide by a client decision whether to accept an offer of settlement of a matter..." (Michie's Hawaii Revised Statutes annotated, court rules, 2001 edition p.853). (Emphasis added).

Rule 1.14 Client Under a Disability

"A) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other

> reason, the lawyer shall as far as reasonably possible, maintain a normal client-lawyer relationship with the client." (Michie's Hawaii Revised Statutes annotated, court rules, 2001 edition p. 881). (Emphasis added).

Comments on rule 1.14

> "Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those often or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody ..." (Michie's Hawaii Revised Statutes annotated, court rules, 2001 edition, p. 881 comment line 6). (Emphasis added).

As previously stated above in this case, the children have been influenced under parental alienation to take sides with the Defendant in the custody proceedings.

They have on many occasions voiced that they wanted to stay with the Defendant (see Videotape, Dr. Lehrke's testimony, Defendant's testimony and Custody Guardian Ad Litem report). This decision (even if wrongfully influenced by parental alienation) has been given to the Custody Guardian Ad Litem attorney who has no other choice according to the rules of professional conduct than to endorse and

support what the clients (children) express and to make representations accordingly. This makes the Custody Guardian Ad Litem report and testimony "biased" because of the legal obligation to "abide by the client's (children's) decisions concerning the objectives of representation." She could not have any other conclusion without breaching Rule 1.2 on Scope of Representation.

ii) In this case the custody guardian ad litem is an attorney to a child in a custody case:

The order appointing the Custody Guardian Ad Litem states:

> "Good cause appearing, IT IS ORDERED that pursuant to HRS Sections 560-5-105, 571-8.(5), 571-24, 571-46(8), 571-47, 578-17, 584-9, 587-34 and/or HFCR 17 (c) and 152, the person indicated above be appointed guardian ad litem to protect the interest of the minor child named above until final disposition of the case or unless sooner discharged by the court subject to the "Duties of a Guardian Ad Litem (GAL)" set forth on the reverse of this Order Appointing Guardian Ad Litem and incorporated herein.
>
> ( )
>
> (5) Appear at all court hearings to represent the child's interest, providing
>
> testimony when required; and (..)"

(Exhibit C-8, Order appointing Custody Guardian Ad Litem) (Emphasis added).

The Custody Guardian Ad Litem in this case has been appointed according to the family court rule HFCR 17 (c) because it is not a "child protective case" but a "child custody case"

HFCR17 (c) states:

> "(c) *Minors or incompetent persons.* The court may appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incompetent person."

iii) The Custody Guardian Ad Litem has based her recommendation on Dr. Lehrke's report which Dr. Lehrke admits cannot be relied upon;

As previously pointed out, Dr. Lehrke would not make any recommendation or opinion about custody and visitation even after reading the Custody Guardian Ad Litem report, which show obviously that her report has no professional foundation

> "Q. But you felt that the custody guardian ad litem seems to have.. .you've read her report, I take it?
>
> A. I've read her first report. I don't know if there were any other reports.
>
> Q. No, there are not, that....that I'm aware of.

The.. .you feel that your testimony will.. .you doubt that it'll shed new light because she seems to have obtained all the same information independently from the same sources.

Do you see that? A. Yes."

Q. Okay. And do I take it then the bottom line for you when you wrote this letter (i) is you don't understand really why anybody needs you to testify at all?

A. That's right." (p.45, lines 11 to 25, Lehrke Transcript, December 19, 2000). (Emphasis added)

(i) See letter Exhibit C 7

iv)The Custody Guardian Ad Litem has no psychological expertise, nor did she obtain consultation from an expert other than Dr. Lehrke for her report and testimony:

The limitations applicable to Dr. Lehrke's work are binding on the Custody Guardian Ad Litem's report and testimony because Dr. Lehrke was the only professional consulted for any mental health input in this entire case.

"Q. And nonetheless just as a general thing, you would defer to anybody who was appointed as a custody guardian ad litem to..to make a custody recommendation based on what?

A. Well, if they do a proper evaluation I would defer to them. But they usually would be consulting with me so they would have mental health input when .. .as part of their evaluation. In this case, um, the custody guardian ad litem did consult with me and so she did have mental health input.

Q. Well, I...I'm having difficulty. Have mental health input, which you've given is not an opinion, it's not a custody evaluation, and you have not done a comparative custody assessment or evaluation, and yet she has mental health input. Isn't the limitations that you have expressed to... .to your work if the custody guardian ad litem in this case is using you as her mental health professional is limited to her as it is to you?

A. Well, she's not limited to consulting with me. She could consult with other

mental health personnel if she wants to. She can refer the children into treatment

with someone else if she wants to."

(p. 70, lines 5 to 25, Dr. Lehrke Transcript, December 19, 2000).

(Emphasis added).

v) The only other evidence that the custody guardian ad litem could rely on is the version of her clients (the children) and the Defendant, which is not sufficient

evidence because both may have a biased position against Plaintiff and in any event there is no valid psychological expertise to evaluate this family and the truth:

The Custody Guardian Ad Litem has testified that she does not have psychological expertise and that no other expert other than Dr. Lehrke has been consulted.

And regarding the children's and the Defendant's version of the truth Dr. Lehrke stated:

> "Q. Okay, and you're not a... .okay. So you're not able to .. .also you're not able to tell then whether they're telling you the truth?
>
> A. Of course.
>
> Q. Okay, and does that include the fact that you're not able to tell if the Father was telling you the truth?
>
> A. Of course "(p. 69, lines 4 to 11, Dr. Lehrke Transcript, December 15, 2000.) (Emphasis added).

vi) The report of the Custody Guardian Ad Litem is biased, incomplete, contains hearsay and relies on no valid expertise of any kind at all.

The Custody Guardian Ad Litem in this case relied mostly on Dr. Lehrke's report. For the reason mentioned above, the incompetent report/ affidavit of Dr. Lehrke should be stricken by the Court.

Because no other valid expertise was utilized to support the Custody Guardian Ad Litem report, it should not be given any weight in this case. All the other evidence gathered by the Custody Guardian Ad Litem is hearsay (teacher) and biased (children and Defendant). No proper attention has been given to the Plaintiffs version, nor to Pastor Paul Pelletier and Mr. Makenzie, supporting the conclusion that the Custody Guardian Ad Litem is biased in this case in seeking only to please her client's wishes (influenced by the parental alienation of the Defendant). She even went so far as to acknowledge that she continued to rely on Dr. Lehrke initial affidavit notwithstanding Dr. Lehrke's withdrawal of the efficaciousness of that affidavit in testimony the day before. Further example of bias of the CGAL relates to her summary Mrs. Shaner (CPS social worker) comments to the effect that the mention of the possibility of any abuse in Quebec could had been different if she had talked to the Mother. Further the investigation "cited" by the CGAL was merely to verify the existence of any broken windows at the Plaintiff house which two local witnesses have never seen (Pastor Pelletier and the next door neighbor Mr.Mackenzie).

Concerning the video tape: it was made at least 6 months after the children were no more in the physical custody of their Mother. Only parental alienation can explain how they could react this way after being separated from her for so long.

Parental alienation has not been investigated by the Custody Guardian Ad Litem, even if her only supposed source of expertise (Dr. Lehrke) gave all indication that it could apply in this case but did no

investigation concerning it, leaving it all to the "Custody Guardian Ad Litem" who in turn did nothing.

> Q. And at this point, are you in a position to tell the Court whether you found anything on Mr. Remis'part to cause this alienation from the mother?
>
> A. I didn't find anything, but that's not conclusive because really I did not do an investigation." (p.23 lines 4 to 12, Lehrke Transcript, December 19, 2000). (Emphasis added).

As to the value of the Custody Guardian Ad Litem report for the determination of "grave risk" in this case, the main "source" of the report, Dr.Lehrke, seems not to be convinced of "anything" after reading it.

> A. well, I — I thought about that in November, I thought about it after I read the custody guardian ad litem's report. I've thought about that at various points. I really don't have opinions about the overall situation at this point because I feel that that's the job of the custody ad litem, to look at it from all angles and - - and say what's really going on here, (p.52 lines 2 to 8, Lehrke Transcript, December 19,2000).

Dr Lehrke, and the CGAL are "bootstrapping" off each other, and neither is doing a proper assessment.

Q. All right. Well, in order for you to arrive at the conclusions you did, isn't it appropriate under the canons of ethics of the American Psychology Association that you have talked -- that you would have talked to the mother?

A. Not if there is going to be a custody guardian ad litem doing an investigation. I don't need to take on that role. That would be a double investigative role and I was not doing a forensic investigation in this case." (p. 58 lines 3 to 10, Lehrke Transcript, December 19, 2000) (Emphasis added).

III. CONCLUSION

The non-return of the children to Canada under the Hague Convention would be an endorsement of the Defendant's breach of the following laws and principles:

i.) The Hague Convention article 3 (Exhibit A):

> "The removal or the retention of a child is to be considered wrongful where
>
> > a) it is in breach of right of custody attributed to a person...." (Emphasis added).

2.) The Canadian court decision on August 22, 2000 (Exhibit C-I). 3.) The Canadian court decision on November

23, 2000 (Exhibit C-2):

> "We acknowledge that the child, Andreas Wailani Remis, born on June 23, 1992 and the child John Anolani Remis, born on September 17, 1990 have been the object of an international abduction (wrongful removal or retention)... according to the article 3 and 5 of the Hague Convention on the civil aspects of international child abduction." (Emphasis added).

4.) The finding of Judge King's decision on the following matter:

> "Petitioner has established as a threshold matter that retention of the children by Respondent was "wrongful" for purposes of ICARA and the Hague Convention" (Order p. 11) (Emphasis added).

5.)The International Child Abduction Remedies Act (ICARA) 42 USC 11601 sec 2 A (2) (Exhibit B):

> "Persons should not be permitted to obtain custody of children **by virtue** of their wrongful removal or retention." (Emphasis added).

6.) The Hawaii 1994 stipulated judgment:

> "...and furthermore on all matters concerning this judgment, any decision would be subject to the determination of a court of competent jurisdiction in the country in which the Mother and the child are residing..." (Exhibit E-1 and

E-2, p.7 article 6) (Emphasis added)

"A. Relocation: The father hereby consents to the relocation of the mother with the child to Canada." (p.2 article 2) (Emphasis added).

7.) The abuse of process of the family court rules on special proceedings (ex parte motion):

HFCR Rule 65 (b) " – when it clearly appears from specific facts shown by affidavit or by the verified complaint or cross-complaint that immediate relief to the applicant is appropriate. —." (Emphasis added).

8.) The jurisprudential outline by the United States court of appeals for the sixth circuit in its decisions re Friedrich vs Friedrich, which is the leading case on the Hague Convention in the United States that includes the following principles:

a) Concerning the grave risk exception:

"All four of these exceptions are 'narrow'. 42 U.S.C. 11601 (A) (4). They are not a basis for avoiding return of a child merely because an American court believes it can better or more quickly resolve a dispute." (p.5 Exhibit P): (Emphasis added)

b) Concerning custody matters:

"The exception for grave harm to the child is not a license for a court in the abducted-to country to speculate on where the child would

be happiest. That decision is a custody matter and reserved to the court in the country of habitual residence (p.6 Exhibit P) (Emphasis added).

c) Concerning the ability of a foreign court:

"In thinking about these problems, we acknowledge that courts in the abducted from country are as ready and able as we are to protect children; if return to a country or to the custody of a parent in that country is dangerous, we can expect that country's courts to respond accordingly." (p.6 Exhibit P)(Emphasis added).

d) Concerning "grave risk":

".. .we believe that a grave risk of harm for the purpose of the convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection." (p.7 Exhibit P)(Emphasis added).

Therefore in light of the newly discovered evidence and the misrepresentations made to this Court, Plaintiff asks this Court to vacate the December 11,2000 Order and order the return of the children to Plaintiff.

Plaintiff requests that Defendant be responsible for all the necessary expenses incurred by or on behalf of Plaintiff, including travel expenses and all the costs of legal representation including attorneys' fees in Canada and United States and the costs for the returning of the children and costs.

Dated: Honolulu, Hawaii, December 7, 2001

PAUL A. LYNCH
Attorney for petitioner

ORIGINAL

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CATHERINE JANE VON KENNEL GAUDIN	)	CIVIL NO. 00-00765-SPK-LEK
Plaintiff,	)	FILED IN THE UNITED
	)	STATES DISTRICT
v.	)	COURT
	)	DISTRICT OF HAWAII
JOHN R. REMIS, JR.,	)	DEC 26 1801
Defendant.	)	WALTER A.Y.H. CHIN, CLERK

ORDER DENYING MOTION TO ENTERTAIN MOTION TO VACATE ORDER, AND DENYING MOTION TO VACATE ORDER FOR LACK OF JURISDICTION

On December 11, 2000, this Court denied Petitioner's Hague Convention Petition for Return of Children. That decision is currently on appeal to the Ninth Circuit Court of Appeals, and is under submission with a panel of the Ninth Circuit. Petitioner has now filed a motion with this Court pursuant to Fed. R. Civ. P. 60, asking it to vacate its December 11, 2000 order based upon allegedly newly-discovered evidence and misrepresentations. That

Motion to Vacate is presently set for hearing in February of 2002.

"The filing of a notice of appeal divests the district court of jurisdiction." Gould v. Mutual Life Ins. Co., 790 F.2d 769, 772 (9th Cir. 1986) (citations omitted). "Unless the appellate court remands to the district court, the latter is without jurisdiction to consider motions to vacate judgment." Id. Where a case is pending on appeal, it is necessary to obtain a limited remand from the appellate court before a district court has jurisdiction to consider a post-judgment motion (such as a Rule 60(b) motion) based upon newly discovered evidence. See Smith v. Lujan, 588 F.2d 1304, 1307 (9th Cir. 1979); Gould, 790 F.2d at 772. The Ninth Circuit, however, rarely remands a case to the district court to consider newly discovered evidence absent some indication from the district court that it would be willing to consider the motion. Parties seeking a limited remand should therefore move in the district court for an indication whether it would be willing to entertain such a post-judgment motion. Such a procedure prevents futile remands. The indication a district court gives is called a "Cratco indication" based upon Cratco, Inc. v. Intermark, Inc., 536 F.2d 862, 869 (9th Cir. 1976).

Accordingly, Petitioner also filed a "Motion to Entertain Petitioner's Motion to Vacate Order Dated December 11, 2000." That Motion to Entertain is also presently set for hearing in February 2002.

The Court has preliminarily reviewed the Motion to Vacate, as well as the exhibits attached thereto, and hereby gives its indication that it is not

inclined to entertain the Motion to Vacate. Upon initial review, the Court sees little if anything in the Motion to Vacate that would indicate a need for it to revisit its December 11, 2000 order.

The Court thus DENIES the Motion to Entertain. Accordingly, the Court also DENIES the Motion to Vacate for lack of jurisdiction. This matter presently remains in the Ninth Circuit. The February 2002 hearing dates are therefore vacated.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, December 26, 2001

/s/

SAMUEL P. KING
UNITED STATES DISTRICT COUT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CATHERINE JANE VON KENNEL GAUDIN	)	CIVIL NO. 00-00765-SPK-LEK
Petitioner,	)	
v.	)	
JOHN R. REMIS, JR.,	)	
Respondent.	)	

ORDER DENYING PENDING MOTIONS

This order rules on three motions: (1) Respondent's Motion to Dismiss Petition as Moot and Alternatively to Continue Hearing and Grant Leave to Conduct Discovery; (2) Petitioner's Motion to Strike Format, all Declarations, and Dismiss Article 13 Defenses; and (3) Respondent's Motion in Limine. As indicated at the hearing, the Court DENIES all three motions. Motion 1: Respondent's Motion to Dismiss as Moot. We now know that Petitioner Catherine Jane Von Kennel Gaudin, nka Catherine Lynch ("Gaudin" or "Petitioner") has a "green card" indicating her status as a "lawful permanent resident" of the United States. Apparently, she had a card since 1974, but it expired in 2003 or 2004 and was then "renewed." It is unclear whether the Ninth Circuit panel (Gaudin v. Remis, 379 F.3d 631 (9th Cir. 2004)) that found the suit not moot knew that she had a "green card." The letter brief to the Ninth

Circuit panel does not specifically mention it, and there is no mention that it had been or would be renewed, or that there was such an application pending. Whether such mention would have made a difference to that panel is unknowable. Ultimately, it doesn't matter for present purposes.

Gaudin is a Canadian citizen. The card indicates she has been a resident of the United States since 1974. She left Hawaii for Canada in 1994. She did not return to Hawaii until 2000 for the Hague Petition proceedings. Subsequently, she married Mr. Paul Lynch, her attorney and a Hawaii resident. The details are set forth in prior orders and opinions in this case.

Previously, the Ninth Circuit held that Petitioner had invoked section 101(a)(15)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(B), as a "non-immigrant alien" for her presence in the United States. Despite the many other factors under a domicile inquiry indicating the Petitioner was a "permanent" resident of Hawaii, her immigration status was legally inconsistent with having a domicile in the United States. Gaudin v. Remis, 379 F.3d 631, 637 (9th Cir. 2004). Under section 1101(a)(15)(B), she was "precluded by law from relocating permanently to the United States." Id. The panel concluded that she was "barred by law from possessing the requisite intent to establish domicile in Hawaii. Because she cannot lawfully have moved permanently to Hawaii, the case is not moot." Id. at 638.

Petitioner points out that she argued to that panel that she had "abandoned" her lawful

permanent residence status in the United States when she left for Canada and did not return to the United States for six years. See 8 C.F.R. § 211.1 (a). This implies that (although this was apparently not specifically mentioned by the Ninth Circuit) even though she had a green card from 1974, it necessarily became invalid. Even if it was "renewed" in 2003 or 2004, she argues, it has no meaning now. The "renewal" was a nullity. Indeed, Petitioner's counsel admitted or posited during the February 2007 hearing that Petitioner is presently "an illegal alien" and is "deportable." Although Gaudin has a facially valid "green card" (it does not expire until 2014) as a "lawful permanent resident," the situation has not changed from when the Ninth Circuit previously decided this issue in 2004. Even if she has a "green card," such status is not necessarily inconsistent with being in this Country "temporarily" under § 1101(a)(15)(B). Cf. Saxbe v. Bustos, 419 U.S. 272 (1974) and Gooch v. Clark, 433 F.2d 74 (9th Cir. 1970). And if she is not in this country under section 1101(a)(15)(B), then she might technically be "deportable."[1] Put another way, even given her "renewed" card, she still is "barred by law from possessing the requisite intent to establish domicile in Hawaii." 379 F.3d at 638. And if she is an "illegal alien" that is "deportable," that would indicate she is not a "permanent" resident of the United States for Hague Convention purposes. Whatever Petitioner's legal immigration status, the record indicates that "she cannot lawfully have moved permanently to Hawaii," 379 F.3d at 637-38, for purposes of the Hague Convention. (It may be

that "permanent" for present purposes is different than "permanent" for "green card" purposes.) In any event, the Court finds the suit is not moot. There is no reason for further continuances for discovery into Petitioner's "intent" to remain here (or to return to Canada).

Motions 2 and 3: Petitioner Gaudin's Motion to Strike Format and Respondent's Motion in Limine.

Evidentiary proceedings are scheduled for May 30, 2007. The format has been set such that the parties submit direct testimony by declaration, in lieu of live direct testimony. These witnesses are then to be available for live cross-examination.

By this motion, Petitioner basically objects to the format as unfair. She indicates it is unfair because the declarations have certain information that might only be relevant to a custody inquiry, that the declarations contain hearsay, or are otherwise objectionable. She contends that the format deprives a party from objecting to a question before the answer is given.

Gaudin's objections to the format are denied. The Court has nearly fifty years of experience as a judge. The current format is designed to save time and to get directly to the heart of the issues. It is often used in non-jury evidentiary matters. The Court can certainly determine what is and is not relevant (and what is otherwise improper under the rules of evidence) within the declarations. The parties can cross-examine as to the authenticity of the declarations and any of the content, subject to other limitations

[1] The Court is not adjudicating her current immigration status. The only question before the Court is whether this suit is moot for purposes of the Hague Convention and the law of the case as set forth in Gaudin v. Remis, 379 F.3d 631 (9th Cir. 2004).

within the Court's discretion at the time of the testimony.

Given the Ninth Circuit's decisions, the issues for the evidentiary hearing will be to answer (at most) these basic lines of inquiry:

1. Is there a "grave risk" of psychological harm if Andreas Remis is returned? If so, are there "undertakings" that can be created so as to allow a Canadian Court to determine custody and minimize any such risk?

   This assessment is to be done under current conditions (not as they were six years ago). Gaudin v. Remis, 415 F.3d 1028, 1036 (9th Cir. 2005). This Court is not to be influenced by state court proceedings or determinations. Id. The Court must consider these alternative "undertakings" if it finds "grave risk." Id. at 1035.

2. According to the Ninth Circuit's opinion, the Court may refuse to order the return of Andreas Remis — regardless of the grave risk determination — if the Court "finds that [he] object[s] to being returned and ha[s] attained an age and degree of maturity at which it is appropriate to take account of [his] views." Gaudin, 415 F.3d at 1037 (quoting Hague Convention, art. 13 ^[2, 19 I.L.M. 1501, 1502 (1980)).

The Court is able to judge the content of the

declarations and testimony in light of these basic inquiries. The Motion is DENIED as to striking the format. Further, given the Ninth Circuit's prior direction, the Court also DENIES the motion to the extent it attempts to dismiss the Article 13 defenses.

For similar reasons, the Court DENIES Respondent's Motion in Limine as to certain statements in the Declaration of Paul Lynch.

IT IS SO ORDERED.

DATED: May 9, 2007.

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

/S/

Samuel P. King
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF HAWAII

CATHERINE JANE VON KENNEL GAUDEN	) CIVIL NO. 00-765 SPK-LEK))
Petitioner,	)
v.	)
JOHN R. REMIS, JR.,	)
Respondent.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DISMISSING PETITION

An evidentiary hearing on the remaining issues in this matter was held on May 30, 2007. Paul Lynch, Esq., appeared for Petitioner Catherine Gaudin, n.k.a., Catherine Lynch. Chunmay Chang, Esq., appeared for Respondent John R. Remis, Jr.

For the reasons set forth, the Court finds that it has been proven by at least a preponderance of the evidence that (1) Andreas W. Remis is of an age and maturity such that his views should be taken into account, and (2) Andreas W. Remis strongly desires to remain in the United States in his current situation with his father and strenuously objects to being returned to Canada. The Court, having

reviewed the evidence submitted and cognizant of the record and history of this case, therefore finds applicable the Article 13 defense to enforcement of a petition under the Hague Convention on the Civil Aspects of International Child Abduction, 19 I.L.M. 1501, implemented in the United States at 42 U.S.C. §§ 11601-11610 ("Hague Convention"). Accordingly, the Petition is DISMISSED.

I.

This case has a long and complex history. It has resulted in three published opinions of the Ninth Circuit Court of Appeals,[1] and two prior evidentiary proceedings in this Court after two prior remands from the Ninth Circuit.[2]

On December 11, 2000, this Court found that a Canadian Court had already determined that Respondent's retention[3] of the children (John A. Remis, IV, and Andreas W. Remis) was "wrongful"

[1] See Gaudin v. Remis, 282 F.3d 1178 (9th Cir. 2002) (Gaudin I); Gaudin v. Remis, 379 F.3d 631 (9th Cir. 2004) (Gaudin II) and Gaudin v. Remis, 415 F.3d 1028 (9th Cir. 2005) (Gaudin III).

[2] See Gaudin v. Remis, Order Denying Petition for Return of Children to Petitioner Pursuant to 42 USC 11601 et seq. (D. Haw. Dec. 11, 2000) [Clerk's Record ("CR") 15]; Gaudin v. Remis, Findings of Fact and Conclusions of Law, and Order Dismissing Petition as Moot (D. Haw. Mar. 3, 2003) [CR 51].

[3] The children had been living with their mother in Canada, with custody determined by 1993 Hawaii Family Court orders or judgments. Respondent had retained the children after a summer visitation with him in Hawaii and after obtaining an order from the Hawaii Family Court temporarily changing the prior 1993 custody judgments. The custody determination was later changed from a temporary basis into a permanent one, and was then affirmed by the Hawaii Supreme Court during the pendency of these proceedings. The Court has not factored this Hawaii custody determination into whether an Article 13 defense applies in the present matter.

for purposes of the Hague Convention. The proceeding was focused on whether return of the children to Canada would present a "grave risk" of harm as set forth in the Hague Convention's Article 13(b) defense. The Court believed that Respondent had proven such a "grave risk" in 2000, and denied the petition. Petitioner appealed.

During the pendency of the appeal, Petitioner married her attorney Paul Lynch and moved to Hawaii. After proceedings which are not germane to the present issues, the Ninth Circuit eventually determined that this suit would be moot (i.e., the Hague Convention would not apply) if Petitioner had relocated "permanently" to Hawaii. See Gaudin I, 282 F.3d at 1183. It remanded with instructions to hold an evidentiary hearing to determine if she had moved permanently to Hawaii, and if so, to dismiss the case as moot. Id. at 1184.

Upon remand, this Court determined that Petitioner had indeed moved "permanently" to Hawaii. The determination was made mostly upon stipulated evidence but without inquiring into Petitioner's immigration status. The Court dismissed the Petition as moot, and Petitioner again appealed.
3(...continued)

On appeal, the Ninth Circuit relied upon Petitioner's immigration status under 8 U.S.C. § 1101(a)(15)(B) and held that, given such status, she was "barred by law from possessing the requisite intent to establish domicile in Hawaii" and therefore could not have moved "permanently" to Hawaii, at least for Hague Convention purposes. Gaudin II, 379 F.3d at 638. The suit was not moot. The matter was transferred to the original panel for a determination on the merits.[4]

The original panel then found that this Court had erred in its December 2000 decision by improperly relying or deferring to certain ongoing proceedings in Hawaii Family Court. Gaudin III, 415 F.3d at 1036. The Ninth Circuit also determined – without reaching the "grave risk" determination – that this Court mistakenly failed to consider adequately alternative remedies ("undertakings") by which the children could be transferred back to Canada without risking psychological harm, and improperly relied upon the existence of ongoing custody proceedings in Hawaii courts. Id. at 1035. It found such deference counter to the purposes of the Hague Convention. Id. at 1035-36. It gave pertinent instructions to this Court as to further proceedings regarding the "grave risk" defense.

The Gaudin III decision also pointed out that a different defense in Article 13 had been raised but not emphasized. That "age and maturity" defense is set forth in Article 13, ¶ 2 of the Hague Convention. The

[4] In collateral proceedings, on May 9, 2007, this Court denied Respondent's new Motion to Dismiss Petition as Moot, which was made given information that Petitioner renewed a "green card" in 2003 indicating "lawful permanent residence" in the United States.

Ninth Circuit said that "the district court should determine . . . after any appropriate factfinding: whether the children object to being returned and whether they are sufficiently mature for those views to carry weight." Id. at 1037. It also noted that such a determination should be made carefully so as to ensure that any statements made by the children are their own considered views and not merely the result of having lived so long with Respondent. Id. at 1037n.3.

John A. Rems, IV, turned 16 on September 17, 2006, during the pendency of this litigation. The Hague Convention no longer applies to him. See Hague Convention, art. 4, 19 I.L.M. at 1501. Current proceedings are now focused on Andreas W. Rems, who will turn 15 on June 23, 2007.

Thus, given the direction from the Ninth Circuit, the Court held a hearing to be able to address these basic lines of inquiry:

1 Is there a "grave risk" of psychological harm if Andreas Rems is returned? If so, are there "undertakings" that can be created so as to allow a Canadian Court to determine custody and minimize any such risk?

This assessment is to be done under current conditions (not as they were six years ago). Gaudin III, 415 F.3d at 1036. This Court is not to be influenced by state court proceedings or determinations. Id.

The Court must consider these alternative "undertakings" if it finds "grave risk." Id. at 1035.

2. Does Andreas Remis "object to being returned" and has he "attained an age and degree of maturity at which it is appropriate to take account of [his] views."? Id. at 1037 (quoting Hague Convention, art. 13 ¶ 2, 19 I.L.M. 1501, 1502 (1980)). If so, then the Court may refuse to order the return of Andreas Remis regardless of the grave risk determination (and even absent such a finding). Id.

II

During the evidentiary proceedings, the Court reviewed the declarations submitted in October 2006 from (1) John R. Remis, Jr., [CR 67], (2) Andreas Wallam Remis [CR 68], (3) John Anolani Remis IV [CR 69], (4) Pamela Boyer Merez, [CR 70], (5) Paul D. Deering [CR 71], and (6) Paul Lynch [CR 78]. The parties were permitted to cross-examine witnesses in court based upon their direct declaration testimony. The Court also admitted into evidence and considered several exhibits, including pictures, school report cards, materials represented to be from Petitioner to the children, as well as original notes or drafts from the children as to their declarations that were submitted as direct testimony.

The Court notes that most of the testimony regarding events in 1999 and 2000 could be highly relevant to a custody determination in 2000 or 2001, but is only marginally relevant to a "grave risk" determination in 2007. The Court has only considered such testimony as background, as necessary to putting testimony as to current events and conditions into context. In any event, the Court has focused

primarily upon the "age and maturity" defense in Article 13(2), and ultimately makes no determination of grave risk.

In addition to cross-examination of Andreas Remis by Petitioner's counsel, the Court met with Andreas in chambers and questioned him under oath in the presence of Court staff and a court reporter, but without counsel or his parents.

The Court, as part of a broad analysis of the record, has reviewed and credits the relevant evidence as to the maturity and current situation of Andreas Remis. The Court credits the testimony of his father (who lives and cares for him on a daily basis); of Paul Beering (who has certain experience in childhood development and who knows both Andreas and his brother John and their father as a family friend); and of his brother, John W. Remis, who is obviously close to his brother in many ways. The report of Pamela Merez was also helpful but not determinative.

The Court, however, mostly relies upon the testimony from Andreas Remis, both from in camera proceedings in chambers, as well as in open court. The Court observed and assessed the demeanor and attitude of Andreas, as well as the content and context of his answers to particular questions. The Court was careful to assess whether his answers were truly his own and not unduly influenced by having been "wrongfully" retained or by any improper indoctrination. The Court found no reason to believe he was prevaricating.

Andreas is doing well in school. He appears to be in a good situation at home. He has adapted well to Hawaii. He is mature and intelligent. He is articulate and acts and speaks like a person beyond his current age (nearly 15). He understands the basics

of the on going proceedings (although the Court doubts he understands all the legal intricacies of the Hague Convention). What he knows is that he is happy now, and does not want, by any means, to be returned to Canada, even for a few months for further legal proceedings. The Court suspects that this has all been true for several years.

The Court finds that it has been proven by at least a preponderance of the evidence[5] that Andreas Remus is of an age and maturity such that his views should be taken into account. The Court further finds that he objects to being returned to Canada for further legal proceedings to determine custody matters. Article 13 of the Hague Convention excuses the duty to return a child to his or her country of "habitual residence" if (1) a respondent proves, by a preponderance of the evidence, that a child is of sufficient maturity and objects to repatriation and, (2) if, *in its discretion, the Court chooses to honor the* child's wishes. Blondin v. Dubois, 238 F.3d 153, 166 (2d Cir. 2001); England v. England, 234 F.3d 268, 272 (5th Cir. 2000); see also Silva v. Pitts, 481 F.3d 1279, 1286 (10th Cir. 2007) (concluding under the particular circumstances of that case that it was appropriate to refuse repatriation to Canada and allowing custody proceedings to occur in the United States). As stated in Silva: "[T]he Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive, provided it has, according to the competent authorities, attained an age and

[5] See 42 U.S.C. § 11603(e)(2)(B) ("In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing — by a preponderance of the evidence that any other exception [i.e., besides article 13b or 20] set forth in article 12 or 13 of the Convention applies.")

degree of maturity sufficient for its views to be taken into account. In this way, the Convention gives children the possibility of interpreting their own interests. Of course, this provision could prove dangerous if it were applied by means of the direct questioning of young people who may admittedly have a clear grasp of the situation but who may also suffer serious psychological harm if they think they are being forced to choose between two parents. However, such a provision is absolutely necessary given the fact that the Convention applies, ratione personae, to all children under the age of sixteen; the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will. . . . It seemed best to leave the application of this clause to the discretion of the competent authorities.

481 F.3d at 1286 (quoting the "Perez-Vera Report" at 433,1300 (emphasis in original)).[6] This Court understands and agrees that the inquiry is "fact-intensive and idiosyncratic." Id. at 1287.

As mentioned, the Court has considered the testimony at the evidentiary hearing, as well as the particular procedural and factual circumstances of this

[6] The "Perez-Vera Report" is recognized as official commentary to the Hague Convention.

References to the "reporter" are to Elisa Perez-Vera, the official Hague Conference reporter for the Convention. Her explanatory report is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it. It is referred to herein as the "Perez-Vera Report." The Perez-Vera Report appears in Actes et documents de la Quatorzieme Session (1980), Volume III, Child Abduction, edited by the Permanent Bureau of the Hague Conference on Private International Law, The Hague, Netherlands.

case (but has not relied upon, nor been influenced by, past Hawaii family court proceedings). The Court, in its discretion, chooses to honor Andreas Remis's wishes and to apply the Article 13 b 2 defense. The Court finds as a matter of law that the defense applies and that it is appropriate to refuse to return Andreas Remis to Canada. Because of such a determination, the Court need not make any determination of the "grave risk" exception under Article 13(b). See Gaudin III, 415 F.3d at 1037.

51 Fed. Reg. 10494-01, 10504 (March 26, 1986).
For the foregoing reasons, the Petition is DISMISSED. IT IS SO ORDERED. DATED: June 1, 2007.

/s/
Samuel P. King
Senior United Sates District Judge

United States District Cout
District of Hawaii

Gaudin v. Remis, Civ. No. 00-00765 SPK-LEK, Findings Fact, Conclusions of Law, and Order Dismissing Petition

AC 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

CATHERINE JANE VON KENNEL GAUDIN Petitioner, V. JOHN R REMIS, JR., Respondent,	JUDGEMENT IN A CIVIL CASE Case: CIVIL NO. 00-00765-SPK-LEK FILED IN THE UNITED STATES DISTRICT COURT OF HAWAII JUNE 5, 2007 At 4 o'clock and 00min p.m. SUE BEITIA, CLERK

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court**. This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Petition is dismissed and Judgment is entered in favor of Respondent, pursuant to the "Findings of Fact, Conclusions of Law, and Order Dismissing Petition" filed on June 1, 2007.

cc: all counsel of record

FILED

OCT 19 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHERINE JANE VON VON KENNEL GAUDIN	No. 07-16308 D.C. No. CV-00-00765-SPK
Petitioner - Appellant,	
v.	MEMORANDUM*
JOHN R. REMIS, Jr.,	
Respondent - Appellee.	

Appeal from the United States District Court

for the District of Hawaii Samuel P. King, District Judge, Presiding

Submitted October 8, 2009** Honolulu, Hawaii

Before: THOMPSON, O'SCANNLAIN, and BERZON, Circuit Judges.

Catherine Jane Von Kennel Gaudin and John R. Remis, Jr. appear before this court for the fourth time, litigating whether the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M. 1501 (the

This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Remis asks this court to sanction Gaudin for raising a frivolous appeal. Federal Rule of Appellate Procedure 38 provides:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Despite quoting this language in full in his brief, Remis has not filed a separate motion with this court requesting fees. Therefore, we may award them only if we provide Gaudin with notice and a reasonable opportunity to respond.

We decline to sanction Gaudin, however. Before sanctioning a litigant for appealing a

district court's judgment, we "[t]ypically . . . have looked for some indication of the appellant's bad faith suggesting that the appeal was prosecuted wtih no reasonable expectation of altering the district court's judgment and for the purpose of delay or harassment or out of sheer obstinacy." *Ruderer v. Fines*, 614 F.2d 1128, 1132 (7th Cir. 1980). Although none of her claims are meritorious, we do not believe that Gaudin so abused the judicial process as to warrant sanction.

For these reasons, the judgment of the district court is **AFFIRMED**. The appellant shall bear the costs of this appeal.

"Convention") requires the return of their children to Gaudin's custody in Canada. As the facts are known to the parties, they will not be repeated here, except as necessary to our decision.

In the current appeal, Gaudin asks us to reverse the district court's 2001 decision refusing to vacate the Hawaii state court custody order governing the custody of the parties' children. She argues that because the state issued its judgment while her federal claim under the Convention was pending, it was premature. *See* Convention, art. 16, 19 I.L.M. at 1501. ("[T]he judicial or administrative authorities of the Contracting State to which the child has been removed . . . shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention . . . ."). The Convention, however, applies only to children who are under sixteen years of age. *Id.* art. 4, 19 I.L.M. at 1501. The parties' children are now seventeen and nineteen. Thus, "this matter truly [is]

moot." *Gaudin v. Remis (Gaudin II)*, 379 F.3d 631, 638 (9th Cir. 2004).

Additionally, Gaudin asks this court to award attorneys' fees. Such a motion generally must be filed before the district court no later than fourteen days after entry of judgment. *See* Fed. R. Civ. P. 54(d)(2); D. Haw. Local R. 54.3(a). Gaudin filed no such motion, and offers no explanation for this omission. Since she failed to request fees before the district court, she has waived this claim.

FILED

DEC 14 2009
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATHERINE JANE VON KENNEL GAUDIN,	No. 07-16300
	D.C. No.
Petitioner - Appellant,	CV-00-00765-SPK
	District of Hawaii,
v.	Honolulu
JOHN R. RIMES, Jr.,	ORDER
Repsondent - Appellee.	

Before: THOMPSON, O'SCANNLAIN, and BERZON, Circuit Judges.

Judges O'Scannlain and Berzon have voted to deny the petition for rehearing en banc. Judge Thompson has so recommended.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to

rehear the matters en banc. Fed. R. App. P. 35.

The petition rehearing en banc is therefore DENIED.

FULL TEXT OF CONVENTION # 28

isualisez cette page en

SCOPE OF THE CONVENTION | CENTRAL AUTHORITIES j RETURN OF CHILDREN | RIGHTS OF ACCESS | GENERAL PROVISIONS FINAL CLAUSES

RECOMMENDATION TO STATES PARTIES

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

(Concluded October 25, 1980)

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions -

CHAPTER I - SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are —
a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention -

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a

child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II - CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.
Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective State to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures -

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III - RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain -

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.
The application may be accompanied or supplemented by -

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a Statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

a) the person, institution or other body having the

care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial

or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV - RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V - GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State

shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel

or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units -

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the

State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI - FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the

third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force -
(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with

Article 39

or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following -
(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;
(2) the accessions referred to in Article 38;
(3) the date on which the Convention enters into force in accordance with Article 43;
(4) the extensions referred to in Article 39;
(5) the declarations referred to in Articles 38 and 40;
(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in
Article 42;
(7) the denunciations referred to in Article 44.
In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.
Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

home | conventions | member states | faq | top *Retrieve and Save this document through ftp with fileformat: .doc or wp5/wpd*
Copyright © The Hague Conference on Private International Law. All Rights Reserved. Please send

all your comments or technical enquiries regarding
this website to Feedback
http://www.hcch.net/e/conventions/text28e.html

UNITED STATES CODE SERVICE

Copyright © 2010 Matthew Bender & Company, Inc.

a member of the LexisNexis Group (TM)

All rights reserved.

*** CURRENT THROUGH PL 111-160, APPROVED 4/26/2010 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 121. INTERNATIONAL CHILD ABDUCTION REMEDIES

Go to the United States Code Service Archive Directory

42 USCS § 11601

§11601. Findings and declarations

(a) Findings. The Congress makes the following findings:

(1)The international abduction or wrongful retention of children is harmful to their well-being.
(2)Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.
(3)International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.
(4)The *Convention on the Civil Aspects of*

International Child Abduction, done at The Hague on October 25, 1980,
establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained,
as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the
meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention
applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and
retention of children and will deter such wrongful removals and retentions.

(b) Declarations. The Congress makes the following declarations:

(1)It is the purpose of this Act to establish procedures for the implementation of the Convention in the United States.
(2)The provisions of this Act are in addition to and not in lieu of the provisions of the Convention.
(3)In enacting this Act the Congress recognizes —

(A)the international character of the Convention; and
(B)the need for uniform international interpretation of the Convention.

(4) The Convention and this Act empower courts in the United States to determine only rights under the Convention
and not the merits of any underlying child custody claims.

HISTORY:

(April 29, 1988. P.L. 100-300, § 2, 102 Stat. 437.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act April 29, 1988, P.L. 100-300, 102 Stat. 437, which generally appears as *42 USCS§§ 11601* et seq. For full classification of such Act, consult USCS Tables volumes.

Short titles:

Act April 29, 1988, P.L. 100-300, § 1, 102 Stat. 437, provides: "This Act may be cited as the 'International Child Abduction Remedies Act'.".

Act Oct. 25, 2004, P.L. 108-370, § 1, 118 Stat. 1750, provides: "This Act [adding *42 USCS § 116060*] may be cited as the 'Prevention of Child Abduction Partnership Act.".

§ 11602. Definitions

For the purposes of this Act--

(1)the term "applicant" means any person who, pursuant to the Convention, files an application with the United
States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to
have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights
of access pursuant to the Convention;

(2)the term "Convention" means the *Convention on the Civil Aspects of International Child Abduction,* done at The
Hague on October 25, 1980;

(3)the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services
under section 453 of the Social Security Act *(42 U.S.C. 653);*

(4)the term "petitioner" means any person who. in accordance with this Act, files a petition in court seeking relief
under the Convention;
(5)the term "person" includes any individual, institution, or other legal entity or body;
(6)the term "respondent" means any person against whose interests a petition is filed in court, in accordance with
this Act, which seeks relief under the Convention;
(7)the term "rights of access" means visitation rights;
(8)the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or
possession of the United States; and
(9)the term "United States Central Authority" means the agency of the Federal Government designated by the Pres
ident under section 7(a) *[42 USCS § 11606(a)]*.

HISTORY:

(April 29, 1988, P.L. 100-300, § 3, 102 Stat. 438.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act April 29, 1988, P.L. 100-300, 102 Stat. 437, which generally appears as *42 USCS§§ 11601* et seq. For full classification of such Act, consult USCS Tables volumes.

§ 11603. Judicial remedies

(a)Jurisdiction of the courts. The courts of the States and the United States district courts shall

have concurrent original jurisdiction of actions arising under the Convention.
(b)Petitions. Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for
arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a
civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.
(c)Notice. Notice of an action brought under subsection (b) shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.
(d)Determination of case. The court in which an action is brought under subsection (b) shall decide the case in accordance with the Convention.
(e)Burdens of proof.

(1) A petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence—

(A)in the case of an action for the return of a child, that the child has been wrongfully removed or retained within
the meaning of the Convention; and
(B)in the case of an action for arrangements for organizing or securing the effective exercise of rights of access,
that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden
of establishing--

(A)by clear and convincing evidence that one of the exceptions set forth in article Lib or 20 of the Convention
applies: and
(B)by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the

Convention
applies.

(f)Application of the Convention. For purposes of any action brought under this Act—

(1)the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual
residence of a child, includes courts and appropriate government agencies;
(2)the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and
(3)the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the
return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit. Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this Act.

(h) Remedies under the Convention not exclusive. The remedies established by the Convention and this Act shall be in addition to remedies available under other laws or international agreements.

HISTORY:

(April 29, 1988, P.L. 100-300, § 4, 102 Stat. 438.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act April 29. 1988. P.L. 100-300, 102 Stat. 437, which generally appears as *42 USCS§§ 11601* et seq. For full classification of such Act, consult USCS Tables volumes.

§11604. Provisional remedies

(a)Authority of courts. In furtherance of the objectives of article 7(b) and other provisions of the Convention, and
subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under
section 4(b) of this Act *[42 USCS § 11630(b)]* may take or cause to be taken measures under Federal or State law, as
appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment be
fore the final disposition of the petition.
(b)Limitation on authority. No court exercising jurisdiction of an action brought under section 4(b) *[42 USCS §*
11603(b)] may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable
requirements of State law are satisfied.

HISTORY:

(April 29, 1988, P.L. 100-300, § 5, 102 Stat. 439.)

§11605. Admissibility of documents

With respect to any application to the United States Central Authority, or any petition to a court under section 4 *[42 USCS §11603],* which seeks relief under the Convention, or any other documents or information included with such application or

petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

HISTORY:

(April 29, 1988, P.L. 100-300, § 6, 102 Stat. 439.)

§ 11606. United States Central Authority

(a)Designation. The President shall designate a Federal agency to serve as the Central Authority for the United States
under the Convention.
(b)Functions. The functions of the United States Central Authority are those ascribed to the Central Authority by the
Convention and this Act.
(c)Regulatory authority. The United States Central Authority is authorized to issue such regulations as may be necessary to cany out its functions under the Convention and this Act.

(d)Obtaining information from Parent Locator Service. The United States Central Authority may, to the extent authorized by the Social Security Act *[42 USCS §§ 301* et seq.], obtain information from the Parent Locator Service.
(e)Grant authority. The United States Central Authority is authorized to make grants to, or enter into contracts or
agreements with, any individual, corporation, other Federal, State, or local agency, or private entity or organization in
the United States for purposes of accomplishing its responsibilities under the Convention and this Act.
(f)Limited liability of private entities acting under the direction of the United States Central Authority.

(1)Limitation on liability. Except as provided in paragraphs (2) and (3), a private entity or organization that receives
a grant from or enters into a contract or agreement with the United States Central Authority under subsection (e) of this
section for purposes of assisting the United States Central Authority in carrying out its responsibilities and functions
under the Convention and this Act, including any director, officer, employee, or agent of such entity or organization,
shall not be liable in any civil action sounding in tort for damages directly related to the performance of such responsibilities and functions as defined by the regulations issued under subsection (c) of this section that are in effect on October 1, 2004.

(2)Exception for intentional, reckless, or other misconduct. The limitation on liability under paragraph (1) shall not
apply in any action in which the plaintiff proves that the private entity, organization, officer, employee, or agent de
scribed in paragraph (1). as the case may be, engaged in intentional misconduct or acted, or failed to act, with actual
malice, with reckless disregard to a substantial risk of causing injury without legal justification, or for a purpose unrelated to the performance of
responsibilities or functions under this Act.

(3)Exception for ordinary business activities. The limitation on liability under paragraph (1) shall not apply to any
alleged act or omission related to an ordinary business activity, such as an activity' involving general administration or
operations, the use of motor vehicles, or personnel management.

HISTORY:

(April 29, 1988. P.L. 100-300, § 7, 102 Stat. 439; Oct. 21. 1998. P.L. 105-277. Div G, Subdiv B, Title XXII, Ch 1, § 2213, 112 Stat. 2681-812; Oct. 25, 2004, P.L. 108-370, § 2,118 Stat. 1750.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act April 29, 1988, P.L. 100-300, which generally appears as *42 USCS§§ 11601* et seq. For full classification of such Act, consult USCS Tables volumes.

Amendments:

1998. Act Oct. 21, 1998, added subsec. (e).

2004. Act Oct. 25, 2004, added subsec. (f).

Other provisions:

Implementation of the *Convention on the Civil Aspects of International Child Abduction.* Ex. Or. No. 12648 of Aug. 11, 1988, *53 Fed. Reg. 30637,* provides:

"The United States of America deposited its instrument of ratification of the *Hague Convention on the Civil Aspects of International Child Abduction* ('Convention') on April 29, 1988. The Convention entered into force for the United States on July 1, 1988. Article 6 of the Convention imposes upon Contracting States an obligation to designate a 'Central Authority' for the purpose of discharging certain specified functions.

"In order that the Government of the United States of America may give full and complete effect to the Convention, and pursuant to section 7 of the International Child Abduction Remedies Act, Public

Law No. 100-300 (1988) [this section], it is expedient and necessary that I designate a Central Authority' within the Executive branch of said Government:

"NOW, THEREFORE, by virtue of the authority vested in me as President by the Constitution and the laws of the United States, *including section 30 J of Tiíe 3 of the United States Code* and section 7 of the International Child Abduction Remedies Act [this section], it is ordered as follows:

"Section 1. Designation of Central Authority. The Department of State is hereby designated as the Central Authority of the United States for purposes of the *Hague Convention on the Civil Aspects of International Child Abduction.* The Secretary of State is hereby authorized and empowered, in accordance with such regulations as he may prescribe, to perform all lawful acts mat may be necessary and proper in order to execute the functions of the Central Authority in a timely and efficient manner.".

§ 11607. Costs and fees

(a)Administrative costs. No department, agency, or instrumentality of the Federal Government or of any State or local
government may impose on an applicant any fee in relation to the administrative processing of applications submitted
under the Convention.
(b)Costs incurred in civil actions.

(1)Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with
their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in
paragraphs (2) and (3).

(2)Subject to paragraph (3). legal fees or court costs incurred in connection with an action brought under section 4

[42 USCS § 11603] shall be borne by the petitioner unless they are covered by payments from Federal, State, or local
legal assistance or other programs.

(3)Any court ordering the return of a child pursuant to an action brought under section 4 *[42 USCS § 11603]* shall
order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal
fees, foster home or oilier care during the course of proceedings in the action, and transportation costs related to the re
turn of the child, unless the respondent establishes that such order would be clearly inappropriate.

HISTORY:

(April 29, 1988, P.L. 100-300, § 8, 102 Stat. 440.)

§ 11608. Collection, maintenance, and dissemination of information

(a) In general. In performing its functions under the Convention, the United States Central Authority may. under such
conditions as the Central Authority prescribes by regulation, but subject to subsection (c), receive from or transmit to
any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority-

(1)may receive such information from a Federal or State department, agency, or instrumentality only pursuant to
applicable Federal and State statutes; and

(2)may transmit any information received under this subsection notwithstanding any provision of law

other than this
Act.

(b)Requests for information. Requests for information under this section shall be submitted in such manner and form
as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such
documents as the United States Central Authority may require.
(c)Responsibility of government entities. Whenever any department, agency, or instrumentality of the United States or
of any State receives a request from the United States Central Authority for information authorized to be provided to
such Central Authority under subsection (a), the head of such department, agency, or instrumentality shall promptly
cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department agency, or instrumentality' shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which-

(1)would adversely affect the national security interests of the United States or the law enforcement interests of the
United States or of any State; or
(2)would be prohibited by *section 9 of title 13, United States Code;*

shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State

department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a).

(d) Information available from Parent Locator Service. To the extent that information which the United States Central
Authority is authorized to obtain under the provisions of subsection (c) can be obtained through the Parent Locator Ser
vice, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service,
before requesting such information directly under the provisions of subsection (c) of this section.

(e) Recordkeeping. The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

HISTORY:

(April 29. 1988, P.L. 100-300, § 9, 102 Stat. 440.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act April 29, 1988. P.L. 100-300, 102 Stat. 437. which generally appears as *42 USCS §§ 11601* et seq. For full classification of such Act, consult USCS Tables volumes.

§ 11608a. Office of Children's Issues

(a)Director requirements. The Secretary of State

shall fill the position of Director of the Office of Children's Issues of
the Department of State (in this section referred to as the "Office") with an individual of senior rank who can ensure
long-term continuity in the management and policy matters of the Office and has a strong background in consular affairs.
(b)Case officer staffing. Effective April 1, 2000, there shall be assigned to the Office of Children's Issues of the Department of State a sufficient number of case officers to ensure that the average caseload for each officer does not exceed 75.
(c)Embassy contact. The Secretary of State shall designate in each United States diplomatic mission an employee who
shall serve as the point of contact for matters relating to international abductions of children by parents. The Director of
the Office shall regularly inform the designated employee of children of United States citizens abducted by parents to
that country.
(d)Reports to parents.

(1)In general. Except as provided in paragraph (2), beginning 6 months after the date of enactment of this Act
[enacted Nov. 29, 1999], and at least once every 6 months thereafter, the Secretary of State shall report to each parent
who has requested assistance regarding an abducted child overseas. Each such report shall include information on the
current status of the abducted child's case and the efforts by the Department of State to resolve the case.

(2)Exception. The requirement in paragraph (1) shall not apply in a case of an abducted child if—

(A)the case has been closed and the Secretary of State has reported the reason the case was closed to the parent
who requested assistance; or

(B)the parent seeking assistance requests that

such reports not be provided.

HISTORY:

(Nov. 29, 1999, P.L. 106-113, DivB, § 1000(a)(7), 113 Stat. 1536.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

This section is based on § 201 of Subtitle A of Title II of Division A of H.R. 3427(113 Stat. 1501A-419), as introduced on Nov. 17, 1999, which was enacted into law by § 1000(a)(7) of Act Nov. 29, 1999, P.L. 106-113.

This section was enacted as part of Act Nov. 29, 1999, P.L. 106-113. and not as part of Act April 29, 1988, P.L. 100-300, which generally comprises this chapter.

§ 11609. Interagency coordinating group

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter I of chapter 57 of title 5, United States Code *[5 USCS §§ 5701* et seq.], for employees of agencies.

HISTORY:

(April 29. 1988, P.L. 100-300, § 10, 102 Stat. 441.)

§ 11610. Authorization of appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this Act.

HISTORY:

(April 29, 1988, P.L. 100-300, § 12, 102 Stat. 442.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to hi this section, is Act April 29. 1988, P.L. 100-300, 102 Stat. 437, which generally appears as *42 USCS§§ 11601* et seq. For full classification of such Act, consult USCS Tables volumes.

§ 11611. Report on compliance with the Hague Convention on International Child Abduction

(a) In general. Beginning 6 months after the date of the enactment of this Act [enacted Oct. 21. 1998] and every 12 months thereafter, the Secretary of State shall submit a report to the appropriate congressional committees on the compliance with the provisions of the *Convention on the Civil Aspects of International Child Abduction,* done at The Hague on October 25, 1980, by the signatory countries of the Convention. Each such report shall include the following information:

(1) The number of applications for the return of

children submitted by applicants in the United States to the Central Authority for the United States that remain unresolved more than 18 months after the date of filing.

(2)A list of the countries to which children in unresolved applications described in paragraph (1) are alleged to have
been abducted, are being wrongfully retained in violation of United States court orders, or which have failed to comply
with any of their obligations under such convention with respect to applications for the return of children, access to
children, or both, submitted by applicants in the United States.

(3)A list of the countries that have demonstrated a pattern of noncompliance with the obligations of the Convention
with respect to applications for the return of children, access to children, or both, submitted by applicants in the United
States to the Central Authority for the United States.

(4)Detailed information on each unresolved case described in paragraph (1) and on actions taken by the Department
of State to resolve each such case, including the specific actions taken by the United States chief of mission in the country to which the child is alleged to have been abducted.

(5)Information on efforts by the Department of State to encourage other countries to become signatories of the
Convention.

(6)A list of the countries that are parties to the Convention in which, during the reporting period, parents who have
been left-behind in the United States have not been able to secure prompt enforcement of a final return or access order
under a Hague proceeding, of a United States custody, access, or visitation order, or of an access or

visitation order by
authorities in the country concerned, due to the absence of a prompt and effective method for enforcement of civil court
orders, the absence of a doctrine of comity, or other factors.

(7)A description of the efforts of the Secretary of State to encourage the parties to the Convention to facilitate the
work of nongovernmental organizations within their countries that assist parents seeking the return of children under the
Convention.

(b) Definition. In this section, the term "Central Authority for the United States" has the meaning given the term in Article 6 of the *Convention on the Civil Aspects of International Child Abduction*, done at The Hague on October 25, 1980.

HISTORY:

(Oct. 21, 1998, P.L. 105-277, Div G, Subdivision B, Title XXVIII, § 2803, 112 Stat 2681-846; Nov. 29, 1999, P.L. 106-113, DivB, § 1000(a)(7). 113 Stat. 1536; Sept. 30. 2002, P.L. 107-228, Div A, Title II, Subtitle A, § 212, 116 Stat. 1365.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The amendment made by § 1000(a)(7) of Act Nov. 29, 1999, P.L. 106-113, is based on § 202 of Subtitle A of Title II of Division A of H.R. 3427 (113 Stat. 1501A-420), as introduced on Nov. 17, 1999, which was enacted into law by such § 1000(a)(7).

This section was enacted as part of Act Oct. 21, 1998, P.L. 105-277, and not as part of Act April 29, 1988, P.L. 100-300, which generally comprises mis chapter.

This section formerly appeared as *42 USCS § 11601* note.

Amendments:

1999. Act Nov. 29, 1999, in subsec. (a), in the introductory matter, substituted "2001" for "1999". in para. (1), substituted "applicants in the United States" for "United States citizens", in para. (2). substituted "abducted, are being wrongfully retained in violation of United States court orders, or which have failed to comply with any of their obligations under such convention with respect to applications for the return of children, access to children, or both, submitted by applicants in the United States." for "abducted.", in para. (3), substituted "children, access to children, or both," for "children" and substituted "applicants in the United States" for "United States citizens", in para. (4), inserted ", including the specific actions taken by the United States chief of mission in the country' to which the child is alleged to have been abducted", and added paras. (5) and (6).

2002. Act Sept. 30, 2002, in subsec. (a), in the introductory matter, deleted "during the period ending September 30, 2001" following "thereafter".